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Provisional agenda

1. Election of officers.
2. Adoption of the agenda and organization of work.
3. Discussion on the special theme for the year: "Indigenous peoples: development with culture and identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples".
4. Human rights:
   (a) Implementation of the United Nations Declaration on the Rights of Indigenous Peoples;
   (b) Dialogue with the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people and other special rapporteurs.
5. Half-day discussion on North America.
6. Comprehensive dialogue with six United Nations agencies and funds.
7. Future work of the Permanent Forum, including issues of the Economic and Social Council and emerging issues.
8. Draft agenda for the tenth session of the Permanent Forum.
9. Adoption of the report of the Permanent Forum on its ninth session.

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Permanent Forum on Indigenous Issues
Ninth session
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Item 3 of the provisional agenda*
Discussion on the special theme for the year, "Indigenous peoples: development with culture and identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples"

Report on indigenous fishing rights in the seas with case studies from Australia and Norway[1]

Summary

At its eighth session, in May 2009, the Permanent Forum appointed Carsten Smith and Michael Dodson, members of the Permanent Forum, as special rapporteurs to prepare a study on indigenous fishing rights in the seas, and requested that the report be submitted to the Permanent Forum at its ninth session, in April 2010. The study includes an analysis of the potential protection of indigenous fishing rights in the seas provided by the existing international framework, including the United Nations Declaration on the Rights of Indigenous Peoples, article 27 of the International Covenant on Civil and Political Rights, International Labour Organization Convention No. 169 and *Apirana Mahuika et al. versus New Zealand*. Case studies from Australia and Norway, with reference to conventions and States in those two respective regions (vis. Papua New Guinea in relation to the Torres Strait Treaty; Sweden and Finland in relation to the Nordic Saami Convention), are presented to enable comparison between these States and with international law.

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[1] Special Rapporteur Michael Dodson would like to acknowledge that the parts of the paper relating to Australia were prepared with the invaluable assistance of Jo-Anne Weinman, Research Associate of the National Centre for Indigenous Studies at the Australian National University. He also gratefully acknowledges support from colleagues who agreed to review this part of the paper and whose comments enriched it, among them, Seán Kerins, Robert Blowes and Asmi Wood.

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I. Introduction

1. The subject of the present paper is the rights of indigenous peoples living in the coastal States around the world to exercise a right to fish in the seas and in waters adjoining them (such as bays, estuaries and fiords). The main issue is whether and to what extent indigenous peoples have the right to a preferred position, either as an exclusive right in certain areas or as a priority in decision-making, for instance, when stipulating fishing quotas in sea fisheries. There is also the question of indigenous participation in the State regulation of public and commercial fishers and fisheries. The paper discusses the relevant international law and describes the national law of Australia and Norway, both with large interests in fisheries, and ends by inviting comparison with international law standards.

2. The words "sea" and "fishing" may have meanings beyond those initially apparent. Jurisdictional context and legal instruments — within a State, between States (regionally or in treaty relationships), and under accepted international norms — influence their complex, sometimes simultaneous meanings.

3. The special rapporteurs recognize the conceptual, practical and legal issues surrounding terminology commonly employed to delineate marine boundaries and focus on "seas" by examining coastal bodies of water adjoining Australia and Norway and associated areas (seabeds, foreshores, estuaries, bays, fiords). Non-indigenous terms are used in both domestic and international contexts, but by reference to indigenous understandings and categories in order to allude to difference or incommensurability in epistemologies.

II. International framework

4. There have been strong developments in international law regarding indigenous peoples in recent decades. A principal issue is indigenous peoples' rights to natural resources. For indigenous peoples living along coastlines, fishing and other uses of the ocean have been their main livelihood and the material basis for their culture. There are no rules or principles in international law dealing specifically with indigenous rights to salt sea fishing. The legal position of coastal indigenous peoples must be derived from more general instruments. The two main conventions of relevance are the International Covenant on Civil and Political Rights and the International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169). The present paper considers to some extent these conventions with a view to their impact on uses of resources by indigenous peoples in the areas where they live and have traditionally developed their coastal indigenous culture.

5. The use of the ocean through centuries, especially the near coastal waters with adjoining bodies such as bays, estuaries and fiords, has had an instrumental effect in creating various coastal indigenous peoples' cultures. In the period since the Universal Declaration of Human Rights, these cultures have been protected by the evolution of international law instruments. The combination of these historic circumstances of indigenous peoples' longstanding traditional coastal usage and the development of influential international law instruments protecting indigenous and minority cultures together constitute the foundation for the rights of indigenous peoples.

A. United Nations Declaration on the Rights of Indigenous Peoples

6. The Declaration includes several articles of relevance to the rights of indigenous peoples to natural resources. First, there is the main principle in article 3 stating:

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

7. The Declaration also expresses more specific rules on rights to natural resources. States shall, according to article 8, paragraph 2, provide effective mechanisms for prevention of "any action which has the aim or effect of dispossessing them of their lands, territories or resources"; article 20, paragraph 1, states that indigenous peoples have the right to be secure in "the enjoyment of their own means of subsistence and development" and to engage freely in "all their traditional and other economic activities"; while article 26, paragraph 2, establishes the right for indigenous peoples to own, use, develop and control "lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use".

8. This instrument is not a treaty and, accordingly, it does not have the binding force of a treaty. However, the adoption of any human rights instrument by the United Nations aspires to some legal effect. Article 42 of the Declaration lays down a new function for the Permanent Forum: to promote the "full application" of the provisions of this Declaration and "follow up [its] effectiveness".

B. Article 27 of the International Covenant on Civil and Political Rights

Rights of indigenous peoples and of minorities

9. Ethnic minorities shall not be denied the right, in community with other members of the group, to enjoy their own culture, under article 27 of the Covenant. Although article 27 is expressed in negative terms it nevertheless, does recognize the existence of a "right" and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation.[2]

10. The United Nations Declaration on the Rights of Indigenous Peoples is the most universal, comprehensive and fundamental instrument on indigenous peoples' rights and forms part of universal human rights law. The basic principles of the Declaration are identical to those of the main human rights covenants and a number of its articles are identical to those of other binding human rights instruments.[3] Indigenous peoples may rely both on the Declaration and on convention-based rules originally intended for ethnic minorities.

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[2] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40* (A/49/40), vol. I, annex V, general comment No. 23, para. 6.

[3] See *Official Records of the Economic and Social Council, 2009, Supplement No. 23*, annex, paras. 6-13.

11. The Human Rights Committee has stated that there is a clear relationship between article 27 and indigenous peoples. Various aspects of the rights of individuals protected under that article — for example, the right to enjoy a particular culture — may apply to ways of life which are closely associated with territory and the use of its resources, which the Committee states "may particularly be true of members of indigenous communities constituting a minority".[4] The relationship is further emphasized in the following statement of the Committee:

> With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples.[5]

Material basis of culture

12. Whether article 27 includes a right to natural resources depends on the meaning of the concept of "culture" in the provision. If this concept may be understood to include the material — that is, economic and physical — bases of the culture of an ethnic minority, then the provision will encompass the use of resources and rights to land and water, such as the right to ocean fishing. General comment 23 (1994) of the Human Rights Committee points in this direction in interpreting the rights protected under article 27: "That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law".[6]

13. There is interconnectedness between the right to the material foundation of culture and the right to special measures. The right to the material foundation of culture will imply recognition of a preferred position for indigenous peoples vis-à-vis other citizens. A right to fishing to a sufficient degree for sustaining the material foundation of an indigenous people's culture might necessitate reducing legal fishing quotas of non-indigenous fishers or perhaps the reservation of certain areas for the exclusive use of Indigenous peoples. A crucial point in this discussion is whether article 27 includes a right to special measures.

14. General comment 23 states that positive measures of protection are "required" in order to ensure that the rights according to article 27 are protected.[7] Moreover, the Committee is very clear in this regard and emphasizes the use of positive measures, saying that although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture:

> Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture ... in community with the other members of the group.[8]

15. This attitude to positive measures is furthermore underlined in connection with the statement cited above on fishing and hunting, where the Committee adds:

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[4] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40* (A/49/40), vol. I, annex V, general comment No. 23, para. 3.2.

[5] Ibid., para. 7.

[6] Ibid.

[7] Ibid., para. 6.1.

[8] Ibid., para. 6.2.

> The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[9]

16. In its conclusion, the Committee points out that the protection of rights according to article 27 imposes specific obligations on States parties, and that the protection of these rights has the perspective of being "directed towards ensuring the survival and continued development of the cultural ... identity of the minorities concerned, thus enriching the fabric of society as a whole".[10]

C. Jurisprudence — *Apirana Mahuika et al. versus New Zealand*

17. There is also jurisprudential support for these readings regarding the basis of material culture and positive measures. In *Lubicon Lake Band v Canada* (1990), the Committee recognizes that

> the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.[11]

18. *Apirana Mahuika et al. versus New Zealand* (2000) is of special relevance to the present paper because it is central to several of the issues concerning indigenous rights to ocean fisheries. In 1840 Maori and the British Crown signed the Treaty of Waitangi, which affirmed the rights of Maori, including the right to the "full exclusive and undisturbed possession of their lands, forests, fisheries and other properties which they may collectively or individually possess". No attempt was made to determine the extent of the fisheries until the 1980s, when inland fisheries were overexploited whereby the State then placed a moratorium on issuing new permits and removed part-time fishers from the industry. This measure had the unintended effect of removing many of the Maori fishers from the commercial industry. Since the efforts to manage the commercial fishery fell short of what was needed, in 1986 the State introduced a quota management system. In 1988, the State started negotiations with Maori, which led in August 1992 to a Memorandum of Understanding. The Maori negotiators sought a mandate from Maori the deal outlined in this memorandum, and the negotiators' report showed that 50 *iwi* (tribes) comprising more than 200,000 Maori supported the settlement. On the basis of that report, a Deed of Settlement was executed in September 1992 by the New Zealand Government and Maori representatives, signed by 110 signatories. Thereafter the Treaty of Waitangi (Fisheries Claims) Settlement Act was adopted the same year. The authors — a group of 19 individual Maori — claim that the Act confiscates their fishing resources, denies them their right to freely determine their political status and interferes with their right to freely pursue their economic, social and cultural development. The Committee stated the principle of the material foundation of culture at the outset:

> It is undisputed that the authors are members of a minority within the meaning of article 27 of the Covenant; it is further undisputed that the use and control

[9] Ibid., para. 7.

[10] Ibid., para. 9.

[11] Ibid., *Forty-fifth Session, Supplement No. 40* (A/45/40), vol. II, annex IX, sect. A, para. 32.2, communication No. 167/1984, 26 March 1990.

> of fisheries is an essential element of their culture. In this context, the Committee recalls that economic activities may come within the ambit of article 27, if they are an essential element of the culture of a community.[12]

19. This is the basis and legal starting point for their further opinion. The right to enjoy one's culture, the Committee said, cannot be determined *in abstracto* but must — like other legal principles — be placed in context. In this case the Committee addressed a more general issue of our times, stating:

> In particular, article 27 does not only protect traditional means of livelihood of minorities, but allows also for adaptation of those means to the modern way of life and ensuing technology. In this case the legislation introduced by the State affects, in various ways, the possibilities for Maori to engage in commercial and non-commercial fishing. The question is whether this constitutes a denial of rights.[13]

20. In order to solve this question, the Committee recalls its General Comment on article 27, according to which, especially in the case of Indigenous peoples, the enjoyment of the right to one's own culture may require positive legal measures of protection by a State party and measures to ensure the effective participation of members of minority communities in decisions which affect them. With this background, the Committee acknowledges that the Treaty of Waitangi (Fisheries Settlement) Act 1992 and its mechanisms "limit the rights of the authors to enjoy their own culture". This is the main conclusion of the Committee's reasoning. The rights according to article 27 were limited. Such limitation would normally have amounted to a breach of the convention.

21. However, the opportunity of the minority to take part in decision-making processes may influence this decision. The Committee has in its case law

> emphasized that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depending on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.
>
> ... [With regard to the facts of this case the Committee notes that] the state party undertook a complicated process of consultation in order to secure broad Maori support to a nation-wide settlement and regulation of fishing activities. Maori communities and national Maori organizations were consulted and their proposals did affect the design of the arrangement. The Settlement was enacted only following the Maori representatives' report that substantial Maori support for the Settlement existed. For many Maori, the Act was an acceptable settlement of their claims.[14]

22. As to the effects of the agreement, the Committee notes that both in regard to commercial fisheries and non-commercial fisheries the Maori got satisfactory results. In regard to commercial fisheries, the effect of the Settlement was

> that Maori authority and traditional methods of control as recognized in the Treaty were replaced by a new control structure, in an entity in which Maori

[12] CCPR/C/70/D/547/1993, para. 9.3.
[13] Ibid., para. 9.4.
[14] Ibid., para. 9.5.

share not only the role of safeguarding their interests in fisheries but also the effective control.[15]

23. In regard to non-commercial fisheries "the Crown obligations under the Treaty of Waitangi continue, and regulations are made recognizing and providing for customary food gathering". The decision strongly supports the view that article 27 of the Covenant protects the right to fish when this is an essential part of the culture of an ethnic minority. Moreover, the authoritative interpretation of the article by the Human Rights Committee, both in its General Comments and individual cases, corroborates this construction of the article.

D. International Labour Organization Convention No. 169

24. This convention concerning indigenous and tribal peoples in independent countries includes several provisions relevant to indigenous rights to sea fisheries. They are first of all of a procedural character. The controlling organ of ILO has declared that "the spirit of consultation and participation constitutes the cornerstone of Convention No. 169 on which all of its provisions are based". The most important of the provisions which constitute this "cornerstone", article 6, makes it a duty for governments to consult the peoples concerned through appropriate procedures, to establish means by which these peoples can freely participate, and to establish means for the full development of these peoples' own institutions and initiatives. These rules are supplemented by article 7 of the Convention and actively applied in ILO practices.

25. Whereas those articles are general provisions on consultation and participation, article 15, paragraph 1, is directly linked to natural resources. The first sentence lays down that the rights of the peoples concerned to safeguard the natural resources pertaining to their lands. It thus supports the Covenant's protection of the material basis of culture. The second sentence points directly to procedural requirements: "(t)hese rights include the right of these peoples to participate in the use, management and conservation of these resources".

26. There was discussion in the making of the convention regarding whether articles concerning 'land' should apply to sea territories. The result was that the central article 14 on rights of ownership and possession of the peoples concerned over lands which they traditionally occupy should be confined to lands (including inland rivers and lakes but not salt sea). In article 15, on the other hand, the concept of "lands" should be understood as having wider meaning, which was expressed in a legal definition in article 13, paragraph 2, stating that: "[t]he use of the term *lands* in articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use". On this ground, the provisions laid down in article 15 shall embrace offshore sea areas that indigenous people use, and thus is applicable with regard to their coastal fisheries. The most important result will be the right to participation in state regulation of quota management, the size of vessels in various sectors of the sea, and the use of fishing equipment.

[15] Ibid., para. 9.7.

III. Case study: Aboriginal and Torres Strait Islander peoples' fishing rights in Australia's offshore waters

27. The present section begins with a brief reference to Australian indigenous perceptions of "sea country", which is ultimately the source of the Australian indigenous relationship to offshore waters, only parts of which have been declared capable of recognition under the Australian legal system. Australian indigenous legal rights and interests relevant to offshore waters are introduced by outlining selected relevant principles of native title and examining jurisprudence in this area. Then, an overview of the division of power between the commonwealth, State and territory levels of government constitutes a precursor to a discussion of other non-native title statutory regimes relating to indigenous offshore fishing rights, including cultural heritage and fisheries management legislation. The Torres Strait Treaty between Australia and Papua New Guinea is also alluded to.

A. Australian indigenous perspectives of sea country

28. Indigenous Australians have a long history of close association with the sea and its resources for subsistence, economic livelihood, spirituality and cultural identity. These connections are well supported by archaeological and anthropological evidence.[16] Indigenous peoples do not distinguish between landscape and seascape, both being equally part of country. This contrasts markedly with the worldview reflected in the Australian legal system, which perceives boundaries where indigenous conceptualizations provide a geographically integrated understanding of land, rivers, estuaries, beaches, reefs, seas, cays, seabeds and associated flora and fauna. Sites of significance and dreaming tracks extend to offshore waters, flora and fauna and form part of the system of traditional law and custom connecting indigenous Australians to sea country.

B. Jurisprudence — native title offshore

29. Indigenous rights and interests in Australian lands and waters predated and survived the imposition of British sovereignty. This was recognized by the High Court of Australia in 1992 through the recognition of native title in *Mabo v Queensland* (No. 2)[17] (the *Mer Island* case). Although the *Mer Island* case itself originally included offshore areas, these were later excised from the claim.

30. Since then, a complex legislative system has taken precedence in defining the framework regulating the field of native title law. Nonetheless, litigation from the Federal and High Courts remains highly relevant to the development and definition of native title law and this jurisprudence therefore merits an examination in relation to native title rights and interests offshore, for numerous reasons: the main statute, the Native Title Act 1993 (Cth), requires that the rights and interests claimed be capable of recognition under the common law in section 223(1)(c); case law also

[16] Archaeological records indicate an Indigenous association with and reliance on coastal and marine resources dating to at least 30,000 years ago: G. D. Meyers, M. O'Dell, G. Wright, S. C. Muller, *A Sea Change in Land Rights Law: The Extension of Native Title to Australia's Offshore Areas*, Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, 1996.

[17] (1992) 175 CLR 1.

continues to provide interpretive guidance complementing the reading of the legislation in general; and finally, there is a persuasive body of judicial and academic commentary contrasting the common law concept of communal native title to statutory native title rights and interests. For these reasons, this section presents only a brief snapshot of selected sections of the Native Title Act before concentrating on recent significant cases raising the issue of indigenous rights offshore under native title, with occasional reference to native title legislation where necessary. The focus is therefore on case law, with legislation examined only where directly relevant to jurisprudence. Overwhelmingly, the native title jurisprudence reveals a trend of recognizing indigenous fishing rights offshore as non-exclusive, non-commercial interests' subject also to the common law public right to fish and the international right of innocent passage.

31. Consent determinations are another important source of information on contractual indigenous rights and interests in lands and waters. These agreements are increasingly being entered into in lieu of litigation and sometimes even following litigation, using a favourable judgment as leverage for negotiation. They are outside the scope of discussion of this paper.

Native Title Act 1993 (Cth)

32. Section 223(2) of the Native Title Act specifically includes fishing rights as capable of falling within native title interests. Section 253(a), (b) and (c) define waters and encompass offshore areas such as seas, including those over which Australia asserts sovereign rights under the Seas and Submerged Lands Act 1973, as per section 6 of the Native Title Act. Tidal inlets, bays, estuaries, harbours or subterranean waters and the beds or subsoil under them or the shore are other waters that are included, and intertidal zones are also considered to be waters, rather than land. While the Native Title Act does not treat sea country claims differently to those over land, section 212(1) protects existing Crown ownership in natural resources, in the control and regulation of water flow and, via section 212(2), the existing public access to and enjoyment of various offshore waters (e.g., beds, banks, or foreshores, coastal waters and beaches).

Commonwealth v Yarmirr[18]

33. In Australian native title law to date, there has been no recognition of exclusive or commercial Indigenous rights to sea country. Indeed, until the *Croker Island* case in 2001, which dealt solely with native title rights over sea country, there was no determination of any form of native title offshore; while the Native Title Act provides for recognizing rights and interests in lands and waters, this is the first successful case determining that both the Act and the common law are capable of recognizing native title offshore. The landmark case of *Croker Island* has subsequently been confirmed.

34. Native title is subject to rights under other Commonwealth and State laws allowing, for instance, recreational and commercial fishing and shipping in native title areas. Native title rights also yield to interests validly conferred by the Crown. Also at issue in *Croker Island* was the relationship between native title and various other rights such as the common law public right to navigate and fish in offshore

[18] (2001) 184 ALR 113; [2001] HCA 56. Hereafter: the *Croker Island* case.

waters and the international right of innocent passage of ships through Australia's territorial sea. The extent of the common law's jurisdiction was questioned (specifically, whether this is measured at the time of the imposition of British sovereignty), with the result that the Court held the common law extends below the low watermark but not into the high seas. (The *Yarmirr* case suggests the possibility of native title extending beyond the 3 nautical miles limit.) Accordingly, the common law public rights to navigate and fish in offshore waters (as well as the international right of innocent passage) were held to encumber native title. The majority reasoned that the encumbered native title rights could amount only to non-exclusive interests being capable of existing without fatal inconsistency. The Court classified the native title right as non-exclusive because it viewed exclusive native title rights as so inconsistent with the other common law public and international rights (which must prevail in any conflict with native title) that native title would have had to have been extinguished had it not been classified so. Accordingly, only selected native title interests or rights to engage in specific activities established on the facts were granted by the Court, which emphasized the non-exclusive, possessory nature of native title as a bundle of rights and interests. In contrast to the majority view, Justice Kirby (in dissent on the High Court) and Justice Merkel (in dissent in the Full Federal Court) both considered that residual exclusive native title rights of control and use could be granted in the form of an exception in favour of the common law public right to fish and navigate and the international right of innocent passage.

Lardil Peoples v State of Queensland[19]

35. Since *Croker Island*, various cases have extended the recognition of native title along Australia's coastline and over its seas and seabed. The *Wellesley Islands* case in 2004 provided useful guidance on how and in what form native title is recognized below the high watermark. The areas where native title was found were in the intertidal zones and adjoining seas for a distance of 5 nautical miles offshore from the islands which had been inhabited at sovereignty, 0.5 nautical miles around other islands uninhabited at sovereignty, and a distance ranging from 2.7-5 nautical miles off the mainland coast. Affirming the reasoning in *Croker Island*, this case also recognized non-exclusive, non-commercial native title rights over parts of the areas claimed, finding the continued existence of native title rights of control of access and use in the waters and submerged lands of the intertidal zone and territorial seas impossible without fatal inconsistency with common law public and international law rights.

36. In practice, non-commercial and non-exclusive offshore native title rights entail native title holders being unable to influence or have recourse against activities conducted in their sea country (including major natural resource developments such as commercial fishing and petroleum exploration), where such activities involve the exercise of the public or international rights recognized at common law and international law, or where such activities are sanctioned by licences or authorities granted under legislation. As commentators note, from a commercial point of view (putting aside social and spiritual benefits and the possibility of unquantified bargaining value), this renders offshore native title rights of little monetary value. It would therefore require only minimal compensation to indigenous Australians for impairment or extinguishment of their offshore native title rights.

[19] [2004] FCA 298. Hereafter: the *Wellesley Islands* case.

Gumana v Northern Territory of Australia[20]

37. The *Blue Mud Bay* native title case in 2007 involved claim areas over both land and offshore waters. The Court in this case recognized the Yolgnu people's non-exclusive right to the intertidal zones and adjacent sea areas claimed. In relation to the intertidal zone, a question was raised as to the classification of bodies of water affected by the "arms of the sea" (i.e., rivers, streams, estuaries), especially if they are not navigable. The Court found that even in non-navigable waters, the common law public right to fish would be exercisable in the entire intertidal zone, which includes tidal waters (i.e., waters affected by the "arms of the sea").

38. The non-commercial and non-exclusive nature of intertidal and offshore native title rights was confirmed again when the judge found himself unable to recognize the Yolgnu people's right to protect sites of religious, spiritual or cultural significance because he saw this as being in irresolvable conflict with the common law public right to fish and navigate, considering that protection would necessarily require exclusion of access by others. Any rights to use the intertidal and offshore waters for commercial purposes traditionally held under indigenous law and custom could not be recognized by the common law and, his Honour contended, should not be the subject of a determination. Consistent with previous cases such as *Croker Island* and *Wellesley Islands*, native title in these areas was held in the *Blue Mud Bay* case to also yield to the rights of commercial and recreational fishers or any validly created interests from the Crown.

Federal Court Case number QUD 6040 2001, unreported: known as the *Torres Strait Regional Seas* case[21]

39. The Torres Strait is the body of water between Australia and Papua New Guinea where the Pacific and Indian Oceans meet and where there are 133 islands, sandy cays and rocky outcrops of which 38 are inhabited. The Torres Strait waters and islands cover approximately 49,000 square kilometres. This region is unique in native title law in two respects: it is home to Australia's Torres Strait Islander indigenous peoples who are culturally distinct from mainland Aboriginal peoples, and it is the subject of an international treaty, the Torres Strait Treaty.[22] Native title was first recognized in this region at Murray Island in the *Mer Island* case. As previously mentioned, this did not involve offshore rights, but rights to land. Since

[20] [2007] FCAFC 23. Hereafter: the *Blue Mud Bay* native title case. See also J. Selway, The "Blue Mud Decision" *Gumana v Northern Territory of Australia* [2005] FCA 50, 2005; and *Gumana v Northern Territory* (2005) 141 FCA 457. An associated issue in this case was heard separately on appeal in *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 and is discussed below in relation to non-native title indigenous interests in the form of statutory grants under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), hereafter referred to as the *Blue Mud Bay* land rights case. See also High Court decision — *Northern Territory of Australia v Arnhemland Aboriginal Land Trust* (2008) 236 CLR 24.

[21] *Naghir People No.1 v Queensland* [2008] FCA 192 (21 February 2008) Native Title number NT QC01/42, Federal Court number QUD6040/2001, unreported. Hereafter: the *Torres Strait Regional Seas* case.

[22] The Treaty between Australia and the Independent State of Papua New Guinea concerning sovereignty and maritime boundaries in the area between the two countries, including the area known as Torres Strait, and related matters [1985] ATS 4, made on 18 December 1978 and entered into force on 15 February 1985. See also United Nations *Treaty Series*, vol. 1429, No. 24238.

then, however, there have been native title consent determinations over all community islands in the Torres Strait.

40. The *Torres Strait Regional Seas* case, covering approximately 34,800 square kilometres, commenced hearing in the Federal Court in 2008 and the trial concluded on 24 July 2009 and judgment is presently reserved at the date of writing the present paper. It involves Papua New Guinea respondents who have asserted their traditional ties with the people and areas of Torres Strait, including assertions that some are of traditional inhabitants of Torres Strait descent despite residing in Papua New Guinea. Status, jurisdiction and standing are naturally therefore relevant issues to be brought before the Court. Exclusive native title is not asserted over the entire claim area. Considerations of international law of the sea are particularly relevant given that the claim encompasses areas beyond Australia's territorial sea.

Native title as a shield

41. Native title can provide a successful defence to the imposition of statutory penalties for breaching provisions governing hunting and removing various fauna (such as crocodiles or fish) for personal consumption, under traditional law and customary practice.[23]

C. Statutory rights and interests offshore aside from native title

42. A significant proportion of Australian fisheries production is exported, including valuable products such as rock lobster, pearls, abalone and tuna. There are numerous statutory regimes which supplement the legislative scheme established under the Native Title Act. The scope of the present paper allows only a brief overview of these management arrangements potentially affecting Indigenous fishing rights in offshore waters.

Fisheries management

43. Fisheries legislation extends up to 200 nautical miles from the coast and, in limited form, further beyond into the high seas. Australia's federal Constitution, via section 51(x), vests exclusive authority to control Australian fisheries in the Commonwealth which possesses the power to control all activity in its territorial waters from the coastline to its internationally recognized territorial sea and seabed, because colonial or State and territory boundaries historically ended at the low watermark.[24] Notwithstanding, owing to extensive negotiations between the Commonwealth and States and territories, jurisdiction over fisheries is now shared through a network of Commonwealth legislation and corresponding State and

[23] See *Mason v Tritton* (1994) 32 NSWLR 572 especially Kirby J. at 582 and *Dillon v Davies* [1998] TASSC (20 May 1998) for cases involving abalone; *Derschaw anors v Sutton, Full Court, Supreme Court of Western Australia*, unreported 16 August 1996; *Underwood v Gayfer* [1999] WASCA 56 (15 June 1999) for fishing with nets during seasonal closure; *Wilkes v Johnsen* [1999] WASC 74 (23 June 1999) for taking undersized freshwater crayfish (section 211 Native Title Act applied to the Fish Resources Management Act 1994); and *Yanner v Eaton* [1999] HCA 53 (7 October 1999) regarding hunting and removing estuarine crocodiles for personal consumption contrary to the Fauna Conservation Act 1974 (Qld).

[24] See *New South Wales v The Commonwealth* (1975) 135 CLR 337, otherwise known as the *Seas and Submerged Lands Act* case.

territory legislation. The Offshore Constitutional Settlement employed section 51(xxxviii) of the Constitution to return jurisdiction over the sea and seabed from the low watermark to 3 nautical miles offshore to States and territories, which also retained jurisdiction over recreational fishing to 200 nautical miles and possibly beyond. Current expansive High Court interpretations of section 51(xxix) suggest the Constitution's external affairs power generally supports the validity of federal laws operating well beyond low watermark.

Protection of cultural heritage

44. Although conceptually nearly inseparable from native title, cultural heritage can also encompass much wider notions than sites of significance and it is accordingly subject to separate legislative arrangements. Nonetheless, cultural heritage matters do frequently overlap with native title interests in land and waters and sometimes with land rights. Native title determinations that are litigated often produce rights and interests that fail to recognize the strong proprietary rights and customary indigenous governance institutions relating to management and protection of cultural heritage.

Land rights

45. Decades before the recognition of native title in 1992, some indigenous-specific proprietary interests existed by virtue of legislative provision in land rights regimes. These Crown grants of title remain distinct from native title interests in land which derive from common law recognition of indigenous traditional law and custom concerning lands and waters. "Land rights", on the other hand, is a term that refers to a variety of statutory grants under different conditions, capable of a variety of legal remedies (in some instance, compensation) for interference with the interest. Title is usually communally held by a group rather than by individuals, and there are usually restrictions on alienating and dealing with the title.

46. The High Court recently decided on a land rights case involving competing interests created under statutory permits for non-indigenous fishers on land that was the subject of a statutory grant of indigenous land rights title under the Fisheries Act (Northern Territory).[25] The Court held that despite obtaining a permit, non-indigenous fishers still required permission from the indigenous peoples to enter and fish on their land because the indigenous statutory land grant constituted an exclusive right to fish in intertidal waters (coastline and river mouths). This decision held the public rights to fish and navigate had been abrogated in the granted area.

D. Torres Strait Treaty

47. This treaty between Australia and Papua New Guinea entered into force in 1985 and recognizes indigenous offshore rights to fish. It establishes a protected zone to safeguard traditional ways of life and livelihoods of traditional inhabitants,

[25] *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 split 5:2 Gleeson CJ, Gummow, Hayne and Crennan JJ, Kirby, J agreeing; Kiefal and Heydon JJ dissenting (30 July 2008). Under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), the relevant land council for that area of Aboriginal land is the Northern Land Council, the relevant body to grant permission to enter and fish.

like fishing and free movement rights. "Traditional" is construed liberally to include modern adaptations of traditions, including in fishing methods. As its name suggests, the treaty applies to Torres Strait Islander people but not to Australia's other indigenous group, Aboriginal people, some of whom also live along the coastline and have traditional links with offshore marine areas. The treaty was recently the subject of a parliamentary inquiry by the Senate Foreign Affairs, Defence and Trade Committee, which has not yet reported to Parliament.[26]

IV. Case study: Saami people's fishing rights in Norway's offshore waters

A. Norwegian fishing regulation and its effect on coastal Saami

48. Norway has a very long coastline with a vast number of fiords. Fishing is, next to oil and gas industries in recent years, the country's main trade.[27] The indigenous people of Norway, the Saami people, have for centuries lived along the country's northern coastline.[28] The most well-known fact in literature about the Saami people is their reindeer-herding, with herding families moving with their flocks nomadically from inland during winter to the coast in summer. However, fishing has always been the main livelihood for the many Saami living permanently in seaside areas. They have largely combined fishing with some farming, hunting and gathering from inland areas. Saami fishing has therefore very much been, and still is, a small-scale activity in the fiords and the near-coastal waters, in comparison with the large and capital-demanding fishing vessels transforming the fishing industry these last decades.

New regulation regime

49. State regulation of sea fisheries underwent drastic change in the late 1980s when quotas of cod were introduced as a consequence of necessary reductions of the total allowable catch.[29] The regulation linked quotas to vessels and not to fishers. These quotas were distributed on the basis of the amount of the catch in previous years, resulting in small vessels in Saami districts to a large degree falling outside the new quota system. This negative consequence for Saami areas was exacerbated by a seal invasion, further reducing the possibility of fishing in fiords and coastal seas in those areas during the years used for counting the historic catch as the basis for quotas. These newly calculated quotas were distributed free of cost to owners of vessels with a sufficient historic catch. In the years that followed, authorities allowed quotas to attach to vessels at the point of sale, and it successively became a market where the price of vessels with a quota can be much higher than the market value of the vessel itself. A certain group of the total allowable catch was established for fishers without quotas. However, those who wished to take part in the fisheries based on a full ordinary quota had to buy a vessel with a quota linked

[26] See http://www.aph.gov.au/senate/committee/fadt_ctte/torresstrait/index.htm.

[27] For description and analysis with special reference to fishing rights in the seas, see Norway's Official Reports (NOU) 2008:5.

[28] Ibid., chaps. 5 and 6.

[29] Ibid., chap. 3.

to it. For the newcomers, including recruitment from the next generation, they had to be able to invest considerable capital in order to join this trade.

50. This development for Saami fishing communities was considered substantially unjust. After a new statutory regulation based on ILO Convention No.169 for the land area of the core Saami districts in Finnmark (the most northern county of Norway), a Coastal Fishing Committee was appointed in 2006 to undertake research and make recommendations regarding Saami demands for rights to fish in the ocean north of Finnmark. The Committee concluded in 2008 that Saami living in fiords and along the coast of Finnmark do have rights to fish which are based on their historical use and rules of international law regarding indigenous peoples and minorities.[30] There is now an ongoing legal and political discussion based on this conclusion. The work of the Committee has not yet come to Parliament, so the discussion is still alive in Norway and may yet capture international interest.

Legal reasoning of the Coastal Fishing Committee (Kystfiskeutvalget)

51. The implication of article 27 on the rights of the Saami has been in the foreground of the legal and political debate since the early 1980s. One should therefore examine the main points of this evolving discussion. In a 1984 report, a Saami Rights Committee (Samerettsutvalget) thoroughly analysed whether this article embraces the material basis of Saami culture as capable of protection.[31] The Committee also considered in this context the legal material concerning the protection of indigenous peoples. Even though the law on indigenous peoples does not concern ethnic minorities more generally, one should interpret article 27 with a view to the needs of each particular minority. When a specific ethnic minority stands in need of a certain cultural basis, and they are deprived of this basis, in reality they lose the possibility to enjoy their culture. This consequence implies that each ethnic minority may require the necessary real foundation which is crucial for the enjoyment of their particular culture. Saami people, as with other indigenous peoples, are an ethnic minority that to a considerable degree has its cultural basis in a traditional use of natural resources. The conclusion of the Committee was thus in principle positive with regard to protection of the material cultural basis, however, uncertain as to the scope of this basis.

52. The Ministry of Justice adhered to that interpretation of article 27 when presenting a 1987 bill to parliament regarding a Saami representative body: the Saami Parliament (the Sameting).[32] In the Norwegian Parliament, the Judicial Committee stated that Norwegian authorities comply with international law developments when clearly formulating a will to establish a positive special measure in relation to Saami. Furthermore the Judicial Committee attaches great importance to the Ministry's interpretation of article 27, and focused on Norway's obligation to contribute in a positive way to the Saami's material capacity to enjoy their culture and to influence the physical and economic foundation for their form of culture.[33] The Minister of Justice stated in parliamentary debate that a people's right

[30] On the right to fishing in the ocean north of Finnmark, see Norway's Official Reports (NOU) 2008:5 (chair Carsten Smith).

[31] On the legal position of the Saami, see Norway's Official Reports (NOU) 1984:18 (chair Carsten Smith).

[32] Ot.prop (1986-87) No. 33 p.37.

[33] Innst O. (1986-87) No.79 p.5.

to enjoy its culture must today be considered a fundamental human right, and the Minister emphasized that the concept of culture must be understood to include the material basis for cultural practice as well.[34]

53. The following year, in 1988, that view was further strengthened when Parliament adopted a constitutional amendment concerning the protection of Saami culture. The Judicial Committee chairperson stated in Parliament that this constitutional provision corresponds to article 27 obligations, and referred to the interpretation of article 27 regarding States' obligations to give active support to enable the Saami to have the means — including in a material sense — to enjoy their culture and their language.[35]

54. This interpretation of article 27 was recently reinforced in a White Paper on Saami policy from the Government to Parliament.[36] With regard to the concept of culture it states:

> In relation to Saami as Indigenous people it is a common interpretation that the provision also includes the material conditions for the total cultural practice, also referred to as the nature basis of Saami culture.[37]

Furthermore, the White Paper stated concerning the duty of the State to contribute in a positive way to the conditions of the Saami people to enjoy their culture: "It is now a common interpretation that the provision lays foundation for demands on positive measures from the authorities in order to comply with their obligations."[38]

55. The Coastal Fishing Committee concluded, as previously mentioned, that Saami living in the fiords and along the coast of Finnmark had a right to fish which was based on historical use and the rules of international law on indigenous peoples and minorities. That conclusion was based on the international law instruments as described in the international framework above. However, considerable weight was attached in addition to the national evaluation of this material in the law-making process in the 1980s leading up to the establishing of the Saami Parliament and adoption of the constitutional protection of Saami culture. The views expressed by the Norwegian political authorities should be regarded as an important element in interpreting the international instruments with regard to Saami rights as citizens and fishers. There are two other provisions of legal importance to this interpretation: first, the constitutional clause — para.110a of the Constitution about the duty of State authorities to confer on the Saami people the means to secure and develop their culture; and secondly, a statutory provision incorporating into Norwegian law among other conventions the International Covenant on Civil and Political Rights and at the same time giving the convention rules priority in case of conflict with domestic legislation.

Draft statute

56. This right to fish has now been developed in a draft statute both in relation to allowable catches and to exclusive rights in some areas. The people living along coastlines and in fiords off Finnmark were entitled to an allowable catch of a

[34] O.tid. (1986-87) p.496.
[35] St.tid (1987-88) p.3026.
[36] Stortingsmelding No.28 (2007-2008).
[37] Ibid., p.33.
[38] Ibid.

volume that would give a reasonable income for a household, and the people living in the fiords of the county got recognized a preferential right to fishing in their fiord. A regional administration was part of the draft with authority to decide on the size of vessels and the use of fishing equipment in an area 4 nautical miles seaward. That administration was delegated power to give preference to fishing with minor vessels and passive equipment as well as to place special weight on the interests of the fiord and near coastal fisheries. The board of the administration is to be composed of three representatives elected by the Saami Parliament and three from the county council.

57. Coastal Saami residents in the most northern districts intermingle with the non-indigenous Norwegian population. These fishing rights were therefore recognized as collective and district-limited rights, rather than indigenous-specific rights. Non-indigenous Norwegian fishers in Finnmark would therefore also benefit from international law-based rights pertaining to indigenous peoples like the Saami. This solution was, however, supported by the Saami Parliament.

B. Norway's present legal and political situation

58. There is so far no Norwegian jurisprudence of importance with regard to Indigenous fishing rights in the sea. The present as well as the future law is depending on an evaluation of the reasoning and the proposal of the Coastal Fishing Committee report. An extensive hearing throughout 2008 produced a result that may be summarized thus: big trade organizations spoke against the law reform proposal whereas local fishers, the Saami Parliament, Saami organizations and many of the municipalities were positive, either totally or partially, towards the proposal.

59. After a hearing period, however, the Attorney-General released a document that is negative towards the Committee's report, both regarding its international law analysis and its statutory proposal.[39] There was a formal response from the leader of the Coastal Fishing Committee, who also had the main responsibility for the international law section of the report.[40] The principal elements of discussion are Saami rights to the material basis of culture and their rights to necessary special measures. The intervention by the Attorney-General is negligent in its reasoning, according to the Committee leader, because it fails to refer to, among other things, the statements of the Government in the recent White Paper.[41]

60. Regarding the material foundation of culture, the Attorney-General considers it to be at least "unclear" whether this will include indigenous fishing rights in the seas. The answer should be that there is hardly any place where one can speak with more clarity about a material cultural basis than with regard to fishing for the Saami living along the coast in the north. Fishing in the ocean was the precondition for settling down in those local Saami communities and for the parts of Saami culture that developed there.

61. The statement of the Attorney-General which probably will cause the strongest reaction is, however, the view expressed that it is "doubtful" whether article 27 lays the foundation for positive special measures. This is a surprising and negative

[39] Letter of 9 March 2009 to the Fisheries and Coastal Ministry.

[40] Letter of 24 March 2009 to the Fisheries and Coastal Ministry.

[41] See para. 55 above.

intervention concerning Saami rights more generally. Not only is it contrary to what the Government considers to be a common interpretation, but to all intents and purposes those days when Saami rights and policy centred mainly on questions of eliminating negative discrimination are now past. Saami rights and policy are now about recognizing special arrangements in order to promote real equality in the country.

62. The Minister of Fisheries has in October 2009 publicized the first official reaction to the Committee's report. The Minister will propose certain fishing rights — but far more minor than in the draft — to the Norwegian Parliament, but the Minister will not recognize the international law basis, nor accept the preferential right to fish in the fiords, nor establish any regional administration with special powers and with Saami Parliament-elected members of the board. According to the established rules concerning consultations between the Government and the Saami Parliament, the governmental position will now be a basis for such consultations. The Saami Parliament will probably fight for a result that better approximates the original draft statute, and especially for the recognition of the international law basis.

C. Nordic Saami Convention (Nordisk Samekonvensjon)

63. A draft Nordic Saami Convention, prepared by a joint Finnish-Norwegian-Swedish-Saami group of experts, was presented in 2005.[42] Shortly thereafter, the draft was adopted by the Saami Parliament in all 3 countries. It is currently being considered by the three Governments.

64. The purpose of the Convention is to develop a legal basis for the Saami as a separate people, regardless of whether individual Saami live in or are citizens of one or another of the 3 States. The Convention will establish a pan-Saami law, and is a foundational document covering the fundamental rights of the Saami people as well as Saami governance, Saami languages and culture, Saami rights to land and water, and Saami livelihoods. The provisions concerning rights to inland water areas and the use of water areas shall apply correspondingly to Saami fishing and other use of fiords and coastal seas. In the negotiations concerning implementation of the Convention, the more detailed rules will certainly be harmonized with the result of the Norwegian statute on the indigenous fishing rights in the seas.

V. Concluding observations

65. Australian fisheries management, cultural heritage protection arrangements and land rights legislation subject indigenous offshore fishing rights to complicated layering of jurisdictions between three levels of government, and public, private and industry interests. As with the native title process, ascertaining indigenous marine rights under these regimes can be complex and lengthy owing to necessary negotiations with many stakeholders. However, unlike native title offshore fishing rights, they have the capacity to recognize some indigenous-specific interests as exclusive rights to fish in offshore waters, subject only to international rights of

[42] Nordisk samekonvensjon, utkast fra ekspertgruppe 26. october 2005. Nordic Saami Convention, draft of expert group (chair Carsten Smith).

innocent passage. These are stronger offshore rights than any thus far obtained under native title, which, even at the fullest recognition as currently interpreted by the High Court, is subject to additional common law public rights. Litigated native title determinations are a recent body of law and bear added risks of providing limited application beyond peculiarities of litigants or facts, whereas other statutory schemes (e.g., land rights) are well established, arguably providing more certainty. Note, however, that while they currently occasionally result in stronger proprietary rights than native title litigation, they remain distinct from native title and in one sense more tenuous because they stem from rights granted by Parliament rather than indigenous-specific rights that inhere by virtue of survival of British sovereignty and which the common law must recognize.

66. The coastal Saami fishing rights in the seas are a major legal as well as political issue for the Saami people. The historical and international law foundation of these rights has now been documented with a positive conclusion by a Government-appointed committee, whereas this conclusion is being criticized by the Attorney-General. There shall now be consultations between the Norwegian Government and the Saami Parliament. For the coastal Saami, fishing is essential for the continuation of settlements in their local communities, which lights many houses in the dark nights up north. These communities are also essential for securing Saami culture, which is in a critical state of existence. The future of this culture is thus dependent on recognition of fishing rights, now an issue in national legal and political debates. A view expressed by the Permanent Forum might have an impact in this regard.

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Secretariat of the Convention on Biological Diversity

Summary

The present report has been submitted by the secretariat of the Convention on Biological Diversity for consideration at the in-depth dialogue of the Permanent Forum on Indigenous Issues at its ninth session. The report provides a summary of the secretariat's work that has been undertaken or is planned regarding indigenous peoples issues in relation to the Convention on Biological Diversity.

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I. Indigenous issues, the Convention on Biological Diversity and its legislative mandate

1. The Convention on Biological Diversity, to which 193 nations now adhere, is an almost universal instrument. It has three objectives: the conservation of biological diversity; the sustainable use of the components of biological diversity; and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. Spanning the thematic work programmes of the Convention are the cross-cutting issues of traditional knowledge innovation and practices; and access to genetic resources and benefit-sharing.

2. The international community has recognized the close and traditional dependence of many indigenous and local communities on biological resources, notably in the preamble to the Convention on Biological Diversity. There is also a broad recognition of the contribution that traditional knowledge can make to both the conservation and the sustainable use of biological diversity, two fundamental objectives of the Convention.

3. The Conference of the Parties has established a working group specifically to address the implementation of article 8 (j) and related provisions of the Convention. The Ad Hoc Open-ended Intersessional Working Group on Article 8 (j) and Related Provisions of the Convention is responsible for the development and implementation of the work programme with the full participation of indigenous and local communities. The Working Group on Article 8 (j) is open to all parties to the Convention, and indigenous and local communities representatives play a full and active role in its work. The Working Group promotes an enhanced participation mechanism for indigenous and local communities, including the nomination of an indigenous co-chairperson to assist the Chairperson of the meeting, as well as an indigenous and local community bureau (referred to as "Friends of the Chair"), and co-chairpersons for any sub-working groups and contact groups that may be established. indigenous and local communities also enjoy enhanced opportunities to make interventions on all agenda items.

4. A voluntary funding mechanism has also been established to facilitate the participation of indigenous and local communities in all relevant meetings held under the Convention.[1] The Convention remains the only multilateral environmental agreement that has a voluntary fund for the participation of indigenous and local communities in meetings held under the Convention.

5. Since traditional knowledge is considered a cross-cutting issue that affects many aspects of biological diversity, it is also taken into account and addressed by the Conference of the Parties and by other working groups, as well as the Working Group on Article 8 (j). In particular, in decision VII/19, D, the Conference of the Parties requested the Ad Hoc Working Group on Access and Benefit-sharing with the collaboration of the Ad Hoc Open-ended Intersessional Working Group on Article 8 (j) and Related Provisions to elaborate and negotiate an international regime on access to genetic resources and benefit-sharing with the aim of adopting an instrument/instruments to effectively implement the provisions in article 15 and article 8 (j) of the Convention and the three objectives of the Convention. This is an ongoing priority of the Convention, which is expected to culminate in the adoption

[1] See decision VIII/5, D, section I.

of the international regime on access and benefit-sharing by the Conference of the Parties at its tenth meeting, to be held in Nagoya, Japan, from 18-29 October 2010.

6. The Convention recognizes the need to exchange information in conjunction with the transfer of technology pursuant to article 16, paragraph 1. The status of indigenous and local communities traditional knowledge is also affirmed by the Conference of the Parties in preambular paragraph 9 of its decision III/14 regarding the implementation of article 8 (j). The Convention also contains three other provisions besides article 8 (j) that deal with the interests of indigenous and local communities. These are articles 10 (c), 17.2 and 18.4.

7. Article 10 (c) requires parties to protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements. Such customary uses can be considered to be synonymous with the knowledge, innovations and practices referred to in article 8 (j), when these are relevant to, or compatible with, the conservation and sustainable use of biological resources.

8. The traditional knowledge, innovations and practices of most indigenous and local communities directly derive from customary use of biological resources, thereby emphasizing the need to read article 10 (c) in conjunction with article 8 (j). The parties have indicated at the sixth meeting of the Working Group on Article 8 (j) a strong interest in pursuing a focus on article 10 (c)[2] in the future work of the Working Group on Article 8 (j).

9. Article 17 provides for the exchange of information. Article 17.2 obliges the parties to facilitate the exchange of information on, inter alia, indigenous and traditional knowledge as such and in combination with the technologies referred to in article 16, paragraph 1. Article 17.2 provides for the repatriation of information, which is of importance to indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity.

10. Article 18.4 lays down the requirements for technical and scientific cooperation, providing that the contracting parties should encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, in pursuance of the objectives of the Convention. This allows for the same obligation and status as other technologies that can contribute to the conservation of biodiversity and for subjecting them to the technology transfer obligations of article 16 that ensure protection of the rights of knowledge holders. This obligation complements the general mandate of article 8 (j) (promote the wider application of the knowledge, innovations and practices of indigenous and local communities), article 12 (research and training), article 16 (access to and transfer of technology), article 17 (exchange of information) and article 19 (handling of biotechnology and distribution of its benefits).

II. Implementation of Permanent Forum on Indigenous Issues recommendations

11. New recommendations arising from both the seventh session (2008) and the eighth session (2009) of the Permanent Forum on Indigenous Issues made to the

[2] See UNEP/CBD/10/2, annex I, recommendation 6/4, paras. 8-11.

Convention were considered by the Working Group on Article 8 (j) and related provisions at its sixth meeting, held in Montreal, Canada, from 2 to 6 November 2009. The resulting draft decisions[3] will be submitted to the tenth meeting of the Conference of the Parties, to be held in Nagoya, Japan, in October 2010, for its consideration and action, as appropriate.

12. It is important to note, however, that some of the recommendations arising from the report of the Permanent Forum at its seventh session (E/2008/43) are already in the process of being addressed since they are related to previous recommendations and current or ongoing processes. The sections below provide an update on these current or ongoing recommendations, and draw attention to recommendations considered by the Working Group and being forwarded to the Conference of the Parties for its possible action.

A. Response to recommendations addressed to the Convention on Biological Diversity by the Permanent Forum on Indigenous Issues at its seventh session

Paragraph 19

13. The secretariat, in partnership with the United Nations University and the Tebtebba Foundation, facilitated a global indigenous peoples consultation on reducing emissions from deforestation and forest degradation in Baguio City, the Philippines, from 12 to 14 November 2008. The secretariat also ensured that indigenous and local communities are represented in climate-related meetings of the Convention, including the 1st meeting of the second ad hoc technical expert group on biodiversity and climate change, held in London from 17 to 21 November 2008. The secretariat submitted a summary document of these meetings to the United Nations Framework Convention on Climate Change for consideration at its Conference of the Parties held in December 2009.

Paragraph 32

14. Article 8 (j) requires that each party to the Convention, subject to its national legislation respect traditional knowledge. In implementing this obligation, the Conference of the Parties is considering ways and means to enable traditional knowledge to be valued alongside scientific knowledge in pursuing the goals of the Convention. The recent work on climate change and biodiversity, including the international expert meeting for the Arctic region on responses to climate change for indigenous and local communities and the impact on their traditional knowledge related to biological diversity held in Helsinki from 25 to 28 March 2008, provided an avenue to explore how these two pools of knowledge could be complementary and equally valued.

Paragraph 33

15. The secretariat, in partnership with the Government of Germany through the German Agency for Technical Cooperation, is pursuing an access and benefit-

[3] See the report of the 6th meeting of the Working Group on Article 8 (j) (UNEP/CBD/10/2), made available as an information document for the Permanent Forum on Indigenous Issues at its ninth session.

sharing capacity-building strategy in the African region, and indigenous and local communities representatives are regularly included in these workshops and in regional capacity-building workshops on protected areas.

Paragraph 80

16. The Working Group on Article 8 (j) is unique both within and beyond the Convention on Biological Diversity and deals specifically with the knowledge, innovations and practices of indigenous and local communities. At the 6th meeting of the Working Group on Article 8 (j) (Malaysia, 2 to 5 November 2009), participants discussed a multi-year programme of work concerning article 8 (j) and related provisions and considered, inter alia, whether the Working Group could be used as a think tank for such important issues as climate change and protected areas. That said, other meetings of the Convention comprise multiple interest holders, and a balance must be achieved for all interested parties, including indigenous and local communities. In such cases, indigenous and local communities can enjoy effective participation mechanisms but cannot be elevated above other parties.

17. The Working Group on Access and Benefit-sharing and the ninth meeting of the Conference of the Parties, in its most recent decisions, have recognized the importance of the participation of indigenous and local communities in the elaboration and negotiation of the international regime on access and benefit-sharing, and the co-chairpersons of the Working Group are endeavouring to ensure that representatives of indigenous and local communities can make timely interventions, within the rules of procedure.

Paragraph 81

18. In decision IX/13, G, paragraph 5, the ninth meeting of the Conference of the Parties requested that the Working Group on Article 8 (j) further develop the draft elements of a code of ethical conduct and submit them to the Conference of the Parties at its tenth meeting for its consideration and possible adoption. Further to this, in paragraph 3 of the same decision, the Conference of the Parties requested the Executive Secretary to transmit the decision to the Permanent Forum on Indigenous Issues and to seek collaboration in the development of the elements of a code of ethical conduct.

19. In response to that request, the Permanent Forum, which is composed of independent experts,[4] has agreed by consensus on the recommendation, as concrete advice to assist in the development and adoption of the code by the tenth meeting of the Conference of the Parties, to be held in October 2010. This advice has been included for the consideration of the parties at the 6th meeting of the Working Group on Article 8 (j) (see UNEP/CBD/WG8J/6/INF/2).

Paragraph 82

20. In decision IX/13, I, paragraph 3, the Conference of the Parties requested the Executive Secretary to draw attention to the important role of indigenous and local communities in activities related to 2010 as the International Year of Biodiversity, and to cooperate closely with the Permanent Forum on Indigenous Issues, to explore

[4] Eight of whom are nominated by Governments and eight of whom are nominated through indigenous regional processes.

opportunities for common activities as related to information exchange and awareness-raising under the guidance of the Bureau. Further to this, and owing to the generous patronage of the Government of Spain, the secretariat has prepared a menu of activities that has been considered by the Bureau and indigenous and local community working groups on education and community awareness, as well as by the secretariat and interested members of the Permanent Forum, so that products can be prepared for use during the International Year. The products will have two focuses, including for indigenous and local communities to improve knowledge of and effective participation in convention processes and/or for the general public to improve knowledge about indigenous and local communities, traditional knowledge and the goals of the Convention.

21. Products under development include:

(a) Animation for use on television, in airlines, on screen savers;

(b) Community-based short films/videos on indigenous and local communities, traditional knowledge and biodiversity;

(c) Exhibitions, United Nations Headquarters;

(d) United Nations Educational, Scientific and Cultural Organization posters partnership (on traditional knowledge), translated into diverse languages;

(e) Community radio stories and interviews translated into diverse languages;

(f) Partnerships to improve related sections of the web pages of the portal www.indigenousportal.com;

(g) Participation guides for indigenous and local communities for effective participation in Convention on Biological Diversity processes (multiple languages) to be developed as training materials;

(h) Article 8 (j) newsletter, *Pachamama*, in English, Spanish and French.

22. Possible high-profile events for the showcasing of products may include but are not limited to the following:

(a) Ninth session of the Permanent Forum, New York, April 2009;

(b) Global Conference on Cultural and Biological Diversity for Development, Montreal, July 2010;

(c) Joint Convention on Biological Diversity/United Nations Educational, Scientific and Cultural Organization 2010 display on cultural and biological diversity (throughout 2010);

(d) Tenth meeting of the Conference of the Parties, Japan, October 2010.

Paragraph 83

23. The "sui generis system" working document (see UNEP/CBD/WG8J/5/6) was being revised in collaboration with the World Intellectual Property Organization and the Permanent Forum and with input from parties, Governments, agencies and indigenous and local communities representatives for consideration at the 6th meeting of the Working Group on Article 8 (j), which met in November 2009. After consideration by the Working Group, a draft decision was formulated and agreed to

and will be sent to the tenth meeting of the Conference of the Parties for adoption and action. The decisions will guide the work of the Working Group on Article 8 (j) for the next biennium and influence future work leading up to 2020.

24. A study on compliance in relation to the customary law of indigenous and local communities, national law, across jurisdictions, and international law, by indigenous experts, was commissioned by the secretariat, in response to decision IX/12, paragraph 13(e) of the ninth meeting of the Conference of the Parties to inform the development and negotiation of the international regime on access and benefit-sharing. The study was made available to the meeting of the group of technical and legal experts on compliance in the context of the international regime on access and benefit-sharing and the 7th and 8th meetings of the Working Group on Access and Benefit-sharing. All relevant documents produced by the secretariat have been forwarded through the secretariat of the Permanent Forum to the Special Rapporteur on sui generis systems for his consideration.

Paragraph 84

25. In decision IX/12, paragraph 11, the Conference of the Parties considered, inter alia, the recommendations of the Permanent Forum and decided to establish three distinct groups of technical and legal experts on: (a) compliance; (b) concepts, terms, working definitions and sectoral approaches; and (c) traditional knowledge associated with genetic resources.

26. The meeting of the expert group on traditional knowledge associated with genetic resources was held in Hyderabad, India from 16 to 19 June 2009 and the report (UNEP/CBD/WG-ABS/8/2) has been made available for consideration at the 8th meeting of the Working Group on Access and Benefit-sharing and to the Working Group on Article 8 (j) for its information.

27. With a view to ensuring that traditional knowledge issues and indigenous peoples rights are fully addressed in the development of an international regime on access and benefit-sharing, some parties and regional groupings, in collaboration with the secretariat, have also pursued their own initiatives, such as the European Union-sponsored Vienna workshop on matters related to traditional knowledge associated with genetic resources and the international access and benefit-sharing regime, which was held from 15 to 17 December 2008, and the Vilm workshop on matters related to traditional knowledge associated with genetic resources and the international regime on access and benefit-sharing, which was sponsored by the Government of Germany and held on the Ilse of Vilm from 6 to 10 June 2009. The reports of those meetings were submitted to the 8th meeting of the Working Group on Access and Benefit-sharing.

28. Finally, indigenous and local communities are working with the Government of Spain and the secretariat to ensure the effective participation of indigenous and local communities in the access and benefit-sharing intersessional process (between the 8th and 9th meetings of the Working Group on Access and Benefit-sharing). Further to this, the Government of Spain has agreed to fund a meeting of indigenous negotiators, facilitated by the secretariat in Madrid, in February 2010.

B. Recommendations ongoing or considered by the Working Group on Article 8 (j) and referred to the Conference of the Parties

Paragraph 81 of the report of the Forum on its seventh session

29. In paragraph 81, the Permanent Forum requested the secretariat of the Convention on Biological Diversity to complete its work on the draft code of ethical conduct for the recognition and protection of indigenous intellectual property and cultural heritage, taking into account the Declaration on the Rights of Indigenous Peoples, as a minimum standard, with a view to adopting the code at the tenth meeting of the Conference of the Parties in 2010, the International Year of Biodiversity.

Paragraph 7 of the report of the Forum on its eighth session

30. In paragraph 7 of the report (E/2009/43), the Permanent Forum welcomed such initiatives as the indigenous and local community, business and biodiversity consultation, held at United Nations Headquarters in New York on 12 and 13 May 2009, as a useful dialogue between the private sector and indigenous peoples, and encouraged further discussions with a view to ensuring the effective implementation of the United Nations Declaration on the Rights of Indigenous Peoples while stimulating community-level businesses based on the sustainable use of biodiversity through such creative partnerships.

C. Draft decisions adopted by the 6th meeting of the Working Group on Article 8 (j) related to recommendations arising from the eighth session of the Permanent Forum on Indigenous Issues for the consideration at the tenth meeting of the Conference of the Parties

31. The 6th meeting of the Working Group on Article 8 (j) considered the recommendations arising from the eighth session of the Permanent Forum on Indigenous Issues and forwarded the following recommendations for the consideration of the governing body (Conference of the Parties) at its tenth meeting, to be held in Nagoya, Japan in October 2010:

(a) *Takes note* of the Permanent Forum on Indigenous Issues recommendation that requests Parties, in the development, negotiation and adoption of the code of ethical conduct, to ensure respect for the cultural and intellectual heritage of indigenous and local communities relevant to the conservation and sustainable use of biological diversity, and to ensure that the standard established in the code adequately reflects relevant international standards, including the Declaration on the Rights of Indigenous Peoples;

(b) *Takes note also* of the report of the indigenous and local community, business and biodiversity consultation (UNEP/CBD/WG8J/6/INF/11), held at United Nations Headquarters in New York on 12 and 13 May 2009, and encourages further discussions with a view to ensuring the effective implementation of the Convention on Biological Diversity, through creative partnerships between stakeholders, while stimulating community-level businesses based on the sustainable use of biodiversity;

(c) *Requests* the Executive Secretary to inform the Permanent Forum on Indigenous Issues at its next session of progress made on the code of ethical conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities relevant to the conservation and sustainable use of biological diversity.

III. Assessment of current work

A. Special theme: Indigenous peoples: development with culture and identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples

32. The most notable advance within the framework of the Convention, relevant to development, comes from the commitment of the parties to implement the third objective of the Convention[5] (the fair and equitable sharing of the benefits arising out of the utilization of genetic resources) through the negotiation and development of the international regime on access to genetic resources and benefit-sharing for adoption at the tenth meeting of the Conference of the Parties in October 2010.

33. The timetable for the finalization of the international regime was adopted at the ninth meeting of the Conference of the Parties and includes in this biennium (2008-2010) three meetings of the Working Group on Access and Benefit-sharing (7th, 8th and 9th meetings), taking place over seven consecutive days. The full details of the Working Group meetings and the expert groups are available from the Convention website at http://www.cbd.int/meetings/. The full text of decision IX/12, including the terms of reference for the three expert group meetings is available from http://www.cbd.int/decision/cop/?id=1655.

34. The Conference of the Parties has recognized the importance of the participation of indigenous and local communities in the elaboration and negotiation of the international regime on access and benefit-sharing in the preamble of decision IX/12. In paragraphs 18 and 19, it encourages parties, other Governments, international organizations and all relevant stakeholders to provide the ways and means to allow for sufficient preparation and to facilitate effective participation of indigenous and local communities, including through national and regional workshops, in the process of the negotiation and elaboration of the international regime, in accordance with decision VIII/5, C. Indigenous peoples effective participation in access and benefit-sharing discussions is further guaranteed through the Working Group on Article 8 (j) and related provisions, which promotes a unique, enhanced participation mechanism for indigenous peoples and local communities, and remains mandated to continue to collaborate and contribute to the fulfilment of the mandate of the Working Group on Access and Benefit-sharing by providing views on the elaboration and negotiation of the international regime on access and benefit-sharing relevant to traditional knowledge, innovations and practices associated with genetic resources and to the fair and equitable sharing of benefits arising from their utilization.[6]

35. The secretariat remains committed to the effective participation of indigenous and local communities in all meetings of relevance to them. The secretariat

[5] See article 1 of the Convention.

[6] See decision IX/13, A, para. 12.

anticipates that the voluntary fund (for indigenous and local communities participation in meetings held under the Convention) will fund a core of approximately 25 indigenous and local community representatives to participate in each of the three meetings of the Working Group on Access and Benefit-sharing between April 2009 and March 2010, as well as an additional 50 participants for the tenth meeting of the Conference of the Parties.

B. Indigenous women

36. In 2008, the Convention developed and adopted the Convention on Biological Diversity Gender Plan of Action, which was drafted with the full and effective participation of indigenous women. In decision IX/24, the Conference of the Parties welcomed the initiative and committed to support the implementation of the plan by the secretariat. The Plan of Action defines the role that the Convention on Biological Diversity secretariat will play in stimulating and facilitating efforts, both in-house and with partners at the national, regional and global levels, to overcome constraints and take advantage of opportunities to promote gender equality. The Plan of Action is the secretariat's and the Convention's continuing response to the global commitments of the past decades, as well as to recommendations made within international forums, and in compliance with major mandates of the United Nations system. It is also a reflection of the increasing awareness that gender equality and women's empowerment are important prerequisites for environmental conservation and sustainable development. The Plan of Action specifically recognizes the crucial role of indigenous and local communities women in the use and transmission of traditional knowledge. The final Convention on Biological Diversity Gender Plan of Action has now been adopted and the secretariat is working with the International Union for Conservation of Nature to ensure that the Plan of Action becomes a reality through the mainstreaming of gender issues through national biodiversity strategies and national action plans.

37. The secretariat continues to cooperate with the secretariat of the Permanent Forum on Indigenous Issues, among other relevant organizations, and with women representatives of indigenous and local communities to ensure that the perspectives and strategies of indigenous women in biodiversity-related issues are taken into account within the work being done under the Convention with regards to traditional knowledge and that capacity-building efforts target indigenous women.

38. Owing to the generous patronage of the Government of Spain, the secretariat in early 2009, negotiated a long-term capacity-building strategy and entered into a three-year memorandum of understanding with la Fundación para la Promoción del Conocimiento Indigena, acting on behalf of the Latin American and Caribbean Indigenous Women's Biodiversity Network, to provide capacity-building for indigenous women to assist them in effectively participating in meetings held under the Convention and specifically to assist their preparations for the tenth meeting of the Conference of the Parties. In addition, thanks to the Government of Spain, the secretariat has completed arrangements to bring on board a young indigenous woman from the Latin American and Caribbean region as an associate programme officer for the Working Group on Article 8 (j) and related provisions, with a view to providing her with extensive training and to achieving the medium-term goal of enabling her to lead this capacity-building effort in the region.

C. Second International Decade of the World's Indigenous People

39. All activities within the framework of the Convention on Biological Diversity related to indigenous and local communities directly contribute to the implementation of the objectives of the Decade of the World's Indigenous People. In particular, article 8 (j) and related provisions directly address matters of the utmost importance to indigenous and local communities by focusing on the respect, preservation and maintenance of the knowledge, innovations and practices of indigenous and local communities, embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity. Article 8 (j) also requires that such knowledge, innovations and practices be promoted with the approval and involvement of the knowledge holders and encourages the equitable sharing of benefits arising from their use. Further to this, recent decisions of the Conference of the Parties have consistently and by consensus interpreted "approval" in this context as "prior and informed consent" and have interpreted their obligations to article 8 (j) to include the "protection" of traditional knowledge.

40. In brief, the Convention on Biological Diversity has considerably advanced the preliminary work of the secretariat on the promotion and protection of traditional knowledge. In distilling the work of the secretariat into outcomes, the Convention has entered a period of enhanced implementation and actively seeks and encourages the involvement of indigenous and local communities in the review, development and implementation of the work programme of the Working Group on Article 8 (j) and related provisions, which contributes directly to the goals of the Second Decade of the World's Indigenous People.

41. In particular, a unique opportunity exists for highlighting the role of indigenous and local communities in achieving the goals of the Convention during the International Year of Biological Diversity, which will be celebrated around the world in 2010. In particular, in the most recent decisions, which include IX/13, E, paragraph 5, and IX/13, I, paragraph 3, regarding indigenous and local communities and the International Year, the parties to the Convention have requested[7] the development of alternative means of communicating public information on traditional knowledge related to the conservation and sustainable use of biodiversity, in plain language and diverse community-friendly formats, including video, television, audio for community radio, songs, posters, theatre/drama and film, in order to ensure the full and effective participation of indigenous and local communities, including women and youth, at local, national and international levels, while supporting the development by indigenous and local communities of their own media tools, and has requested the Executive Secretary to draw attention to the important role of indigenous and local communities in activities related to 2010 as the International Year of Biodiversity and to cooperate closely with the Permanent Forum on Indigenous Issues to explore opportunities for common activities related to information exchange and awareness-raising under the guidance of the Bureau.

[7] Through the Global Initiative on Communication, Education and Public Awareness and the clearing house mechanism.

D. Other matters of interest to the Permanent Forum on Indigenous Issues

Indigenous languages and indicators update

42. At the sixth meeting of the Conference of the Parties, the Convention on Biological Diversity adopted a strategic plan and the 2010 target to significantly reduce the rate of biodiversity loss. In decision VII/30, the seventh meeting of the Conference of the Parties adopted a framework for assessing progress towards the 2010 target covering seven focal areas, goals, targets and the identification of provisional indicators, comprising indicators for immediate testing and possible indicators for development. One focal area is to protect traditional knowledge, innovations and practices. Goal 9 of the 2010 target is to maintain the sociocultural diversity of indigenous and local communities, with two targets and relevant indicators to be developed by the Working Group on Article 8 (j):

- Target 9.1: Protect traditional knowledge, innovations and practices
- Target 9.2: Protect the rights of indigenous and local communities over their traditional knowledge, innovations and practices, including their rights to benefit-sharing.

43. With regard to traditional knowledge, an indicator on the status and trends in linguistic diversity and speakers of indigenous languages was included as an indicator for immediate testing. In decision IX/13, H, the Conference of the Parties recommended that a maximum of two additional indicators on the status of traditional knowledge, innovations and practices should be selected for inclusion in the framework by the Ad Hoc Working Group on Article 8 (j) and Related Provisions at its sixth meeting.

44. The secretariat is collaborating with the United Nations Educational, Scientific and Cultural Organization regarding the lead agency for the collection of data on the status and trends in linguistic diversity and is exploring other possible complementary indicators with the International Labour Organization, the Food and Agricultural Organization of the United Nations and the International Fund for Agricultural Development. Complementary indicators being explored include traditional occupations/livelihoods and changing land-use patterns. The secretariat reported on these matters at the 6th meeting of the Working Group on Article 8 (j), held in Malaysia, from 2 to 5 November 2009.

45. Two additional indicators for traditional knowledge were considered at the 6th meeting of the Working Group on Article 8 (j) and are proposed for consideration by the tenth meeting of the Conference of the Parties, to complement the adopted indicator (on status and trends of linguistic diversity and numbers of speakers of indigenous languages), and the focal area on protection of traditional knowledge, innovations and practices, in order to assess progress towards the post-2010 biodiversity target, as well as to assess progress in the implementation of the revised strategic plan.

46. The Working Group on Article 8 (j) considered a proposal by the indigenous working group on indicators for the following additional two indicators for status and trends in traditional knowledge and decided to adopt the proposal as a draft decision to be considered by the tenth meeting of the Conference of the Parties:

(a) Status and trends in land-use change in the traditional territories of indigenous and local communities;

(b) Status and trends in the practice of traditional occupations.

IV. Gaps and possible solutions

A. Recommendations to the secretariat

47. The secretariat of the Convention, serves 193 parties, engages both rights and stakeholders, but strictly speaking is not an implementation body. The Convention is implemented through the Conference of the Parties and through implementing agencies such as the Global Environment Facility and the United Nations Development Programme. The Convention itself has a focused mandate on conservation, sustainable use and benefit-sharing, and article 8 (j) applies specifically to knowledge, innovations and practices of indigenous and local communities relevant to conservation and sustainable use, making it essential to receive recommendations within the scope of its mandate, so that action, where possible, can be taken.

48. It has been noted by the secretariat that some Permanent Forum recommendations are directed to the Conference of the Parties and some are directed to the secretariat; on occasion, it is not clear to whom they are directed. Also, it is necessary for recommendations directed to the Conference of the Parties to first be discussed by the Working Group on Article 8 (j), which usually meets once every two years and for the Working Group then to forward the recommendation as a draft decision to the governing body, the Conference of the Parties, for its consideration and possible adoption for action. This biennium process makes it difficult to report on concrete outcomes on an annual basis. However, the new working methods initiated by the Forum, including the new reporting cycle, which allows for the in-depth reporting of a limited number of agencies per annual session, provides a useful mechanism to ensure that agencies can elect for in-depth reporting every few years, thereby making it easier to report on concrete outcomes.

B. Recommendations to parties

49. Regarding Convention processes, Permanent Forum recommendations, when adopted by consensus by the Conference of the Parties to the Convention on Biological Diversity, become Conference of the Parties decisions, and parties then have an obligation to take them into account, implement them and report on them through their national reports.[8] The fourth national reports were due on 30 March 2009. After receipt of the national reports, the secretariat carries out an in-depth analysis to gain an accurate picture of the implementation of the Convention on the ground. An analysis of approximately 70 of the fourth national reports was made available for consideration at the 6th meeting of the Working Group on Article 8 (j).

[8] The national reports are the only legal obligation of parties to the Convention, and the parties have received advice from the secretariat requesting the effective participation of indigenous and local communities in consultations on, and the drafting of, the national report.

A more thorough analysis of the fourth national reports will be prepared for the 7th meeting of the Working Group.

50. In the analysis and overall assessment by the secretariat of the third national reports (based on 132 out of a possible 192 reports), the overall implementation of article 8 (j) and related provisions has required increased efforts and support. Support to the efforts to determine the status and trends of traditional knowledge, innovations and practices of indigenous and local communities has progressed in many countries because of an increasing awareness of its value across a wide range of areas; however, only some countries recognize the importance of the traditional knowledge of indigenous and local communities to biodiversity conservation and sustainable use.

51. There remain several challenges and obstacles facing countries in the implementation of article 8 (j), including financial, capacity, social, political, public awareness and demographic obstacles. Parties reported that the 10 most significant obstacles to implementation of article 8 (j) were the following, in order of the perceived level of challenge to implementation:

(a) Lack of financial, human and technical resources;

(b) Lack of economic incentive measures;

(c) Lack of public education and awareness at all levels;

(d) Existing scientific and traditional knowledge not fully utilized;

(e) Lack of adequate scientific research capacities to support all the objectives;

(f) Lack of horizontal cooperation among stakeholders;

(g) Lack of capacities for local communities;

(h) Lack of synergies at national and international levels;

(i) Lack of appropriate policies and laws;

(j) Inadequate capacity to act, caused by institutional weaknesses.

52. Finally, the secretariat would like to emphasize that a collaborative development of recommendations allows for the crafting of recommendations that fall within the mandate of the relevant agencies and therefore facilitates acceptance and implementation. Mechanisms such as the Inter-Agency Support Group on Indigenous Peoples' Issues remain an innovative approach for collaboration and action by the international system. Because of the rather lengthy Convention on Biological Diversity processes that recommendations must follow before they can become implementable decisions, the newly established arrangements of in-depth dialogues for only six agencies each year may greatly assist in ensuring that agencies and their governing bodies have sufficient time to consider, take action and report on outcomes to the Permanent Forum. In addition, the secretariat manages hundreds of decisions each biennium; prioritization of the various recommendations depends on political will, adequate funding, resources and capacity.

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Future work of the Permanent Forum, including issues of the Economic and Social Council and emerging issues

Study on the need to recognize and respect the rights of Mother Earth

Summary

The present document contains the study prepared by special rapporteurs pursuant to the request of the Permanent Forum on Indigenous Issues at its eighth session that a study be prepared on the implementation of General Assembly resolution 63/278, taking into account, inter alia, the consideration and recognition of Mother Earth rights (see E/2009/43, para. 76).

* E/C.19/2010/1

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I. Harmony with Mother Earth and the possibility of a declaration*

1. In 2009, the United Nations General Assembly, at its sixty-fourth session considered, among other issues, the environment, sustainable development, biodiversity, climate change, desertification, water as a basic resource and a draft resolution entitled "Harmony with Nature". The United Nations Department of Public Information mentioned the draft resolution in a press release, underscoring its novelty.[1] While the press release referred to a resolution on harmony with Mother Earth, it is in fact entitled "Harmony with Nature", which is the same document that was subsequently amended to accommodate the concerns of sponsors.[2]

2. The Plurinational State of Bolivia submitted the draft resolution on harmony with nature. The term "Mother Nature" is important to the Bolivian proposal because it conveys the Andean concept of *Pachamama*, the symbiosis between humankind and nature, thereby giving nature its due respect. The original wording gave a certain slant to the United Nations approach, which, in any case, has been reflected in the final version adopted. The changes are editorial rather than substantive. The error of the Department of Public Information is rather understandable and can be accommodated, even though there is a slight difference. The draft resolution on harmony with Mother Earth proposes "a possible declaration of ethical principles and values for living in harmony with Mother Earth", while the one on harmony with nature makes no such reference, nor does it rule it out.

3. Also at the initiative of Bolivia, the General Assembly had, on 22 April 2009, designated that date as International Mother Earth Day. However, that designation was not fully endorsed. The draft resolution on harmony with nature was adopted on 21 December. In it, the Assembly recalls earlier statements and actions of the United Nations related to the protection of nature since the adoption of the World Charter for Nature; expresses its "concern at the documented environmental degradation and the widespread challenges resulting from human activity" and its conviction that "humanity can and should live in harmony with nature"; and, to that end, "invites Member States, the relevant organizations of the United Nations system, and international, regional and subregional organizations to consider, as appropriate, the issue of promoting life in harmony with nature" and to make use of International Mother Earth Day, as appropriate.

4. The indigenous peoples are conspicuously missing from the list of those so invited. Nor are they mentioned in the draft resolution on harmony with Mother Earth, which does not mean either that they are being excluded. To exclude them would be unthinkable in light of the United Nations Declaration on the Rights of Indigenous Peoples. Moreover, on an issue that is so vitally important to them, no resolution should be adopted subsequently without their direct contribution, or through national mechanisms responsible for indigenous issues. That is the approach that should be taken if the proposal for a "possible declaration of ethical principles

* The present document contains the study prepared by Carlos Mamani and Bartolome Clavero.

[1] Available from: http://www.un.org/News/Press/docs/2009/ga10907.doc.htm.

[2] See list of draft proposals of the Second Committee as at 11 December 2009, available from: www.un.org/ga/second/64/proposals.shtml; see also A/C.2/64/L.24/Rev.1, A/C.2/64/L.24.

and values for living in harmony with Mother Earth" is to be heeded. This study makes a case for taking such an approach.

II. Environment and sustainable development: the Brundtland paradigm

5. The United Nations began focusing on nature in an ongoing and institutional manner in 1972, when the United Nations Environment Programme (UNEP)[3] was established and entrusted with a mission "to provide leadership and encourage partnership in caring for the environment by inspiring, informing and enabling nations and peoples to improve their quality of life without compromising that of future generations". The purpose is clear. Thus, the United Nations became increasingly aware that purely economic development which was booming at that time was so destructive as to potentially jeopardize the survival of humankind. Since then, corrective policies have been promoted to reverse the environmental degradation and the destruction of nature in pursuit of development that is inimical to mankind. However, such policies failed to fully address the problem. If only for the sake of efficiency, this is where the indigenous peoples do and should come in. Concerns related to justice, as expressed by the Declaration on the Rights of Indigenous Peoples, will be addressed later.

6. In 1972, following the adoption of the Action Plan of the United Nations Conference on the Human Environment, problems began to be identified and policies formulated without taking into account the existing reservations in indigenous territories or the very existence of the indigenous peoples themselves.[4] The indigenous peoples were not mentioned in the World Charter for Nature, adopted by the General Assembly on 28 October 1982, which purported to lay down the basic requirements for the protection of nature.[5] In that Charter, the United Nations states that it is "aware that mankind is part of nature", "convinced that every form of life is unique, warranting respect regardless of its worth to man", and "persuaded that lasting benefits from nature depend upon the maintenance of essential ecological processes and life support systems, and upon the diversity of life forms". With such goals in mind, the Charter sets forth objectives and duties free of control or monitoring mechanisms, "taking fully into account the sovereignty of States over their natural resources". Under such circumstances, it was not surprising that indigenous people were not readily involved in the protection of nature.

7. In 1987 the international paradigm on nature was appropriately defined on the basis of the report of the World Commission on Environment and Development, entitled "Our Common Future" (also called the Brundtland Report in honour of Gro Harlem Brundtland, the Chairman of the Commission).[6] It is the report that

[3] See United Nations Environment Programme; available from http://www.unep.org; www.unep.org/iyb.

[4] See Report of the United Nations Conference on the Human Environment, available from: http://www.un-documents.net/aphe-b5.htm.

[5] See http://www.pnuma.org/docamb/cn1982.php of the UNEP Regional Office for Latin America and the Caribbean.

[6] Report of the World Commission on Environment and Development: Our Common Future, available from: http://www.un-documents.net/wced-ocf.htm.

proposes and develops the concept of sustainable development in a protected environment, including an analysis of the dominant economic, political and social systems, while excluding cultural aspects or other economic, political and social systems of lower standing in the current world. "Recognizing rights and responsibilities" is the title of a section of the report. There is no mention of the rights or responsibilities of indigenous peoples in the report.[7]

8. The key term in the Brundtland paradigm is sustainable development, with the stress on the noun *development*. The adjective *sustainable* is of course an important qualification, but a qualification nonetheless. According to the report, the prominent responsibilities belong with States, as do the corresponding powers. Those responsibilities are also shouldered in part by international and non-governmental organizations, but not by indigenous peoples, who are not taken into consideration in any way.

III. Biodiversity and climate change: between restriction and exclusion

9. A significant development took place at the 1992 United Nations Conference on Environment and Development or Earth Summit. The Summit constituted an important step forward in that it brought States closer to making serious commitments through multilateral treaties, beginning with the Convention on Biological Diversity.[8] It was also the moment in which international environmental and biodiversity policy first took note of the indigenous presence. The preamble refers to indigenous peoples, recognizing their valuable role in the conservation of biological resources. Indigenous peoples are also taken into consideration for practical purposes (article 8 (j)). However, they are not referred to as peoples with rights and responsibilities in their own capacity and in their own right. Instead, they are referred to as "indigenous communities" dependent on States. By implication, this includes cases where the State does not control the indigenous territory, which is usually the most biologically diverse. At the same time, in order to manage biodiversity, States have an obligation to ensure the "approval and involvement" of indigenous communities and to share the benefits with them. By the same token, it is implied that communities have an obligation to share their knowledge of biodiversity with the State.

10. The Convention restricts the role of indigenous communities to the most narrowly local, in situ context. At every other level, the indigenous presence in the Convention evaporates completely. The Convention provides for the holding of meetings of the Conference of the Parties at regular intervals. The indigenous peoples, who do not so much as appear in their own capacity, are not parties to the Convention. The parties are the ratifying States, and it is States that hold summits. Yet in practice, as a result of their own initiative and pressure, indigenous peoples do make their presence felt — not in their own right at summits, but rather by contributing advice or making proposals at pre- or intersessional meetings, or

[7] Available from: http://www.un-documents.net/ocf-12.htm#II.5.1 (paras. 81-84).

[8] See http://www.cbd.int/convention/convention.shtml for the official website of the Convention and its development.

through incorporation and co-option into State delegations.[9] Strictly speaking, summits on biological diversity take place between States, without the participation of peoples as such.

11. The Earth Summit held in 1992 in Rio de Janeiro adopted Agenda 21, the Programme of Action for Sustainable Development. The figure 21 refers to the twenty-first century. Chapter 26 of the Agenda is entitled "Recognizing and strengthening the role of indigenous people and their communities".[10] Without referring to peoples as such, the chapter comes close to a rights-based approach by making an explicit connection with the parallel development of international law on indigenous peoples. It states that some of its provisions are "already contained in such international legal instruments as the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention (No. 169) and are being incorporated into the draft universal declaration on indigenous rights, being prepared by the United Nations working group on indigenous populations".

12. The draft in question would ultimately become the 2007 Declaration on the Rights of Indigenous Peoples. It is not certain that the 1992 draft was a response to the approach of ILO Convention No. 169, as stated in the Agenda. The right of indigenous peoples to self-determination had already been incorporated as the foundation of the other rights relevant to the Agenda, such as the right of indigenous peoples to land, to resources for traditional use and to their own customary systems for the management of those resources. That question will be considered below. What needs to be stressed here is that, as far as the indigenous presence is concerned, there is no substantial difference in focus between the Convention on Biological Diversity and Agenda 21, although the latter takes on particular significance in that it emphasizes the potential contribution of indigenous peoples beyond the local level. In substance, chapter 26 of Agenda 21 applies the Brundtland paradigm to indigenous issues. It effectively posits as a category the sustainable autonomous development of indigenous communities. The stress remains on the goal of development, whose conceptualization and implementation do not require indigenous self-determination. The adjective is added, but indigenous communities do not in effect gain any self-determination.

13. By and large, throughout the Rio process, the Brundtland paradigm continues to undergird institutional development and substantive international policies on biodiversity for development. General Assembly resolution 64/196 on harmony with nature provides that a sub-item with a similar title should be included in the provisional agenda of the General Assembly under the item entitled "Sustainable development". The same can be said of climate change, another recent area of concern and action for the United Nations. The United Nations Framework Convention on Climate Change (UNFCCC) was also concluded in 1992, and was supplemented in 1997 by the Kyoto Protocol for the reduction of carbon emissions, the primary cause of climate change. The Conference of the Parties held pursuant to

[9] Http://www.cbd.int/convention/cops.shtml: Decisions adopted by the Conference of the Parties to the Convention on Biological Diversity at its Fourth Meeting, Decision IV/9: Implementation of article 8 (j) and related provisions.

[10] Http://www.un.org/esa/dsd/agenda21, on the website of the United Nations Department of Economic and Social Affairs, Division for Sustainable Development.

the Framework Convention can also be genuine world summits. More specifically, they are of course conferences or in their case, summits to address climate change.[11]

14. However, there is one important respect in which United Nations biodiversity policies differ from climate change policy in their planning and delivery. Neither the Framework Convention nor the Kyoto Protocol refers to the possibility of an indigenous contribution, or indeed to the indigenous presence. The Framework Convention strongly reaffirms the principle of the responsibility, and consequently the power, of States. It does so in terms of apparent exclusivity which can cause confusion, especially in view of the overlap with United Nations agencies and programmes: "Reaffirming the principle of sovereignty of States in international cooperation to address climate change".[12] Such principles again exclude indigenous peoples. The sharp contrast between the Convention on Biological Diversity and the Convention on Climate Change is a telling sign of the uneven situation that currently prevails with regard to the operative recognition of the indigenous presence. There is a contradiction both in principle and in practice.

15. Indigenous organizations now have experience of international action gained through their participation in various United Nations forums since the 1980s. They are fighting to make their presence felt at forums where decisions on issues that affect them are taken. Such forums include conferences on climate change, to which they have yet to gain even a minimally formal degree of access; they do not even have access to the fairly limited summits on biological diversity.[13] Worse still, it is well-known that indigenous peoples suffer not only from externally induced climate change but also from some of the international policies aimed at reversing it that were adopted without their involvement. The above notwithstanding, prospects have improved since 13 September 2007, as a result of the United Nations Declaration on the Rights of Indigenous Peoples.

IV. International law: the rights of indigenous peoples and of Mother Earth

16. The burning issues of the environment, sustainable development, biodiversity and climate change, involve a wide range of rights enshrined in the United Nations Declaration on the Rights of Indigenous Peoples, including their basic right to self-determination. Strictly speaking, the whole Declaration is important,[14] in view of all the changes in policy and practice that all United Nations bodies, Member States and, of course, last but not least, indigenous peoples themselves, have to make in order to implement it. In the light of the right to political, economic, social or

[11] Http://www.un.org/spanish/climatechange/newsarchive/year2009/group4.shtml: Gateway to the United Nations system's work on climate change.

[12] See http://unfccc.int/resource/docs/convkp/conveng.pdf on the website of the United Nations Framework Convention on Climate Change, and http://unfccc.int/resource/docs/convkp/kpeng.pdf for the text of the Kyoto Protocol.

[13] http://derechosmadretierra.org/2009/12/14/cumbre-de-copenhague-foro-de-pueblos-indigenas-presenta-propuesta-en-cop15/#more-535 (in Spanish): Copenhagen Summit. Indigenous Peoples Forum presents proposal at COP 15, website of Mother Earth. Harmony with Nature.

[14] http://www.un.org/esa/socdev/unpfii/index.html, link on the portal.

cultural self-determination, above all what is needed is the participation and consent of the peoples.[15]

17. The Declaration guarantees the right of indigenous peoples to their own material and other resources, to use them in accordance with their aspirations and needs, in accordance with their *sustainable development* priorities and strategies based on their own culture. Earth, biodiversity and climate change conferences or summits should have changed their procedures by now to allow proper access to representatives of indigenous peoples, thereby affording them an international forum not only to defend their rights and interests but also to contribute to the well-being and prosperity of humanity with their own proposals, such as the Andean concepts of the rights of Mother Earth, *Pachamama*, or of living well, *Suma Qamaña* or *Sumak Kawsay*[16] which will be discussed below.

18. The indigenous peoples who hold the view that nature is Mother Earth, endowed with rights, are committed to promoting that world view in all aspects of their internal administration. They also have the right to promote it at relevant national and international forums in order to promote it as a form of relationship between mankind and nature. It is worth emphasizing this because there are still prejudices that are preventing the exercise of such indigenous rights, within individual countries and in the world at large. The most widespread prejudice views the concept of nature as Mother Earth endowed with her own rights as a religious creed the promotion of which would impinge upon freedoms such as the freedom of conscience. Even if that were the case, indigenous peoples have the right to uphold it as a cultural value, along with the right to promote it, if the goal is to give it a status of general domestic or international law.

V. Indigenous peoples and Mother Earth: the Andean belief

19. We are going to focus on the Andean concept of Mother Earth by delving into colonial records. The Earth is sacred. The relationship of the *ayllu*, the political community, with the Earth, is intimate belonging. The Earth gives life, nourishes, comforts in her lap. In Aymara she is *Llumpaqa Mama*, although the Quechua word *Pachamama* is the most widespread. *Pachamama* is the most widespread name for Mother Earth, normally used in Quechua, Aymara and even in Spanish. Anello de Oliva recorded the term in its fundamental sense: "They also worshipped the fertile earth, which they call Pachamama: which means fertile and fruitful Mother Earth."[17]

20. Fertile Mother is a name that conceives of the Earth as a source of life, like the field, the garden people tend for their food, nature of abundant water and air. In this regard the concept of nourishment is fundamental: people, like the other beings that

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[15] http://www.un.org/esa/socdev/unpfii/documents/E_C_19_2009_14_en.pdf, annex: *article 42 of the United Nations Declaration on the Rights of Indigenous Peoples*.

[16] *Constitution of the Republic of Ecuador*, Title II, chaps. II and VII, and Title VII. *Constitution of the Plurinational State of Bolivia*, Article 8.I: "The State shall adopt and promote, as ethical and moral principles of a pluralistic society, the motto '*ama qhilla, ama llulla, ama suwa* (do not be lazy, do not lie, do not steal), *suma qamaña* (living well), *ñandereko* (the harmonious life), *teko kavi* (the good life), *ivi maraei* (land without evil) and *qhapaj ñan* (noble path or life)'".

[17] Giovanni Anello de Oliva, *Historia del Reino y Provincias del Perú* (Lima, Catholic University of Peru, 1998) p. 165. References below: p. 151.

populate the Earth, together are members of a community of life. Fertile reflects the unique ability to accommodate a community of life, a community nurturing life on a continuing basis. In Aymara rearing is *uywa*, Mother Earth is *uywiri*, the one who rears.

21. Polo de Ondegardo wrote of the indigenous peoples' worship of the sun, the stars, thunder and the Earth, which they called *Pachamama*. The Spanish colonizers viewed this concept of Mother Earth of the ancient inhabitants of Peru as nothing more than idolatry, an indigenous error that had to be corrected through evangelization, another form of colonization. Polo's own comments on that idolatry give us an idea of the respect and esteem that the Andeans had:[18]

> The coastal Indians worship the sea so it will give them fish or calm waters, casting white maize flour or red ochre, or other things, into it. The Indians of the Sierra, just as they worship the lakes, worship the sea even though they have not seen it, and they call it *Mamacocha*, while the Aymara call it *Mama Cota*; the highlanders who come down to the plains to trade worship the sea and the plains with different ceremonies. And the snowy mountains are also revered and worshipped by the Indians.

22. Mother Earth is a greater concept that encompasses others such as *Mamacocha* or *Qhuya* (queen or wife of the Inca) which is the name given to mines. *Qhuya* is the insides of the Earth. Polo de Ondegardo wrote:

> The same is true in the mines which they call Coya, which they worship, and they worship the metals which they call Mama, and the ores which they call Corpa; they worship them, kissing them, and organizing various ceremonies for them.

23. Sacred worship forestalled any destruction or misuse. Mother Earth is, after all, an all-encompassing concept. In recognition and to worship her Sanctuaries (*wak'as*), meeting places and places of learning were built, along the *ceques* or paths that linked the rest of the country with the heart of Cuzco, *Quri Kancha*, the golden courtyard.

> They had two kinds of temple, natural and man-made. Natural temples included skies, elements, sea, earth, mountains, cliffs, great rivers, springs, lakes or deep lagoons, caves, steep outcrops, mountain tops ... all were revered by them.[19]

24. Man's journey through life is dotted with natural sanctuaries. To journey through life is to obey the law and the community's rules. The path is opened paving the way for future generations, in preparation for living well, *Suma Qamaña* or *Sumak Kawsay*. The authorities must strive to care for it by devising patterns of conduct through compliance with the law. Having discharged their duty, the *Kuraka* (*mallku* in Aymara), became *k'acha runa*, beautiful people, emulated by the whole community, especially the youth.[20] Compliance with the norms is judged by the

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[18] Polo de Ondegardo, *Informaciones acerca de la Religión y Gobierno de los Incas* (Lima, Imprenta y Librería Sanmarti y Cía) p. 3. References below: p. 191.

[19] Attributed to Blas Valera, *Relación de las costumbres antiguas de los naturales del Perú*, in *Tres Relaciones de Antigüedades Peruanas* (Madrid, Ministry of Development of Spain, 1879), p. 146.

[20] Roger Rasnake, *Autoridad y poder en Los Andes. Los Kuraqkuna de Yura* (La Paz, Hisbol, 1989); Tom Zuidema, *Reyes y Guerreros. Ensayos de cultura andina* (Lima, Fomciencias, 1989),

community, in terms of its ability in allocating resources and how it supports the family and community economy, which is also a result of a balanced relationship with nature. Within this conceptual framework, which conceives of the rights as a journey to be experienced, we will now analyse the concept of Mother Earth and her rights.

25. Blas Valera was familiar with Andean tradition and appreciated the people's profound respect for the Earth and its elements, understanding that they viewed them as temples. All the historical accounts regarding these places tell the same story. Tata Sajama (doctor Sajama), Mama Tungurahua and Qhapia (Copacabana), on the shores of Titicaca, are just some of the places that were considered sacred and seen as centres of energy, power and knowledge. People with that knowledge could communicate with the mountain summits, or *apachetas*. Magnificent buildings were also built in many places as shrines; the ruins of Pachacamac on the Pacific coast are one such example.

26. The indigenous peoples' culture of respect and reverence for the Earth was intolerable to the foreign colonizers, who made every effort to eradicate whatever they considered to be idolatrous. José de Acosta considered that "the sinfulness and perdition involved in all this was exaggerated to the point of folly", referring to how the indigenous peoples could worship rivers, fountains, ravines, rocks or large stones and mountains.[21]

27. They could not understand that the indigenous peoples had a different view of the world from the Christian one, a view centred on the omnipresence of terrestrial divine beings. Nonetheless, the ancient chroniclers developed an interesting awareness of this indigenous culture. For example, Blas Valera explained that the ancient *pirwanos* (the indigenous peoples of *Tawantinsuyu*) did not consider their sacred places to be deities, but rather viewed them as holy because of their significance. The natural shrines did not need identification. They simply contained an *usnu*, a cavity in the ground for the storage of sacred items and for communication with the Earth.

28. Fernando de Santillán likewise understood that the sun, moon and earth were deities for "the Indians": "They also worshipped the Earth, which they said was their mother". José de Acosta says the same thing: "They also worshipped Earth, which they called Pachamama". Similarly they venerated the sea, known as *Mamacocha*. Being a learned man, the priest found their practices to be the same as those of the ancient Europeans, who worshipped the goddess *Tellus*. All the European chroniclers took it for granted that the indigenous peoples had a special relationship with the Earth. Most of them described the resulting practices as idolatrous and took upon themselves the task of eradicating them. Ludovico Bertonio wrote:

> Pachamama, Suyrumama: the earth that brings forth bread; among the ancient peoples, it was a reverential name, since they saw that the earth gave them

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Nathan Wachtel, *El regreso de los antepasados. Los indios uru de Bolivia, del siglo XX al XVI* (Mexico City, Fondo de Cultura Economica, 2001).

[21] See José de Acosta, *Natural and Moral History of the Indies*. Edited by Jane E. Mangan, translated by Frances M. López-Morillas (Durham and London, Duke University Press, 2002), p. 261-262. Subsequent references: p. 258.

> food, and so they said "Pachamama huahuamaha. Oh earth, I will be your son".[22]

29. *Suyrumama*, like *Qhuya* (mines), is a name for the bowels of the earth. *Qhuya* is also identified with woman: "They held the earth to be the special advocate of women who were in labour, and made sacrifices to her when a woman was about to give birth".[23] Watering the Earth makes it particularly fertile and productive. Hence the translation "earth that brings forth bread". The invocation *Pachamama huahuamaha* "Pachamama, I will be your son", refers principally to *Suyrumama*. However, when they said the name *Pachamama*, they were also invoking the universe. *Suyrumama*, or *chacra* (smallholding or garden), an expression of fertile and fruitful Mother Earth, was a sacred place; its sacredness was signalled by erecting a large stone, or *pukara* (fortress), as a marker (*chimpu*). Polo de Ondegardo said in this respect:

> In some places they usually placed a long stone in the middle of the *chacras* to invoke the virtue of the earth and provide protection.

30. The "long stone" is called a *pucara* or *tacagua*. Even today, a small tower is erected in the *chacra*, particularly when it is communal. *Suyrumama*, or *chacra*, demonstrates the tremendous significance given to life, symbolized by crop-bearing. The harvest was a festival, as described by so many chroniclers. The members of the *ayllu* took part, wearing their best attire, singing and dancing. The best of the crop was identified and set aside in order to celebrate the seeds, which were considered to be *illa* (a symbol). *Zara Mama* (Mother Corn) was dressed as a woman, with her traditional *anacos*, *lliclla* and *topos* (poncho, woollen shawl and pins). Sacred corn festivals were held at the end of the harvest,[24] when the corn was ripening and at the start of seed time. The festival took place in the *colca*, the granary where the crops owned by families, the *ayllu* and the State were kept. After the imposition of Christianity, the celebration was merged with Corpus Christi. Such festivals still take place in the Andes. It was so important to amass food, clothing and other items used by society that, according to Blas Valera, the name given by the Spaniards to *Tawantinsuyu*, i.e. "Peru", was in fact *pirwa*, another name for the silos in which the harvest is stored in the southern Andes.

> To this god, they entrusted their granaries, their treasures and their warehouses, as well as the most distinctive cobs of corn or first fruits, and the storerooms that they had inside their homes for their treasures, clothing, dishes and weapons were called *pirua*.

31. It is interesting to see the linkage of concepts and the systemic unity that this consideration of nature and the cosmos gradually reveals. A passage from Anello de Oliva introduces us to the broader meaning of *Pachaqama*, which, like Mother Earth, has been given different names throughout history:

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[22] See Ludovico Bertonio (1612), *Vocabulario de la lengua Aymara* (La Paz, Musef, 1984), p. 242. Subsequent references: pp. 208 and 242.

[23] See Fernando de Santillan, *Relacion del origen, descendencia, politica y gobierno de los Incas*. In *Tres Relaciones de Antigüedades Peruanas* (Madrid, Ministry of Development, 1879), p. 31. Subsequent references: pp. 30-35.

[24] See *Denuncia que hace don Juan Tocas principal y fiscal mayor de la doctrina de San Pedro de Tiellos contra Alonso Ricari principal y camachico del Pueblos de Otuco anexo de la doctrina de San Pedro de Huacas*, in *Procesos y visitas de idolatrias. Cajatambo Siglo XVII*, Pierre Duviols (Lima, PUCE, 2003).

> The Indians on the coast had the sea as their god, and made sacrifices to it; just as those in the mountains worshipped the Sun. All these superstitions and rites were started on the devil's orders, so that they would cease to worship Pachacamac, and indeed they turned away from him to such an extent that they abandoned his great and magnificent temple, having forsaken him for many years.

32. Religious prejudices aside, this tells us that *Pachaçama* is the spirit of the universe, *pachaqamaq*, since *qamaq* means breath, or creative fire. Consequently, the ancient chroniclers presented him as a deity. The temple of Pachaqama, now Pachacamac on the Pacific coast, had great significance as the dwelling place of the universe. The account written by Fernando de Santillán states that:

> ... the Inca ordered [a house] to be built in his presence, and it is a building that is standing today, of great height and splendour, which they call the great *huaca* of Pachacama, on a large mound of earth that looks almost completely man-made, and above it the building; there the huaca said to the Inca that his name was Pachahac camac, which is to say, "He who gives being to the earth".

33. There is no question that esteem for Mother Earth goes well beyond the concept of the fertile and productive *Suyrumama*. It dates back to the very beginnings of indigenous groups themselves. Hence of the importance attributed to certain sacred sites known as places of origin (*pyajariñas*), Tambo Toco being the most famous. These places attest to the special relationship between the indigenous peoples and the Earth in that it goes to their origins, the bowels of the Earth: the *chinkanas* (tunnels) and the *qhuya* (mines).

34. The significance of Mother Earth is reflected in the value placed on invoking it, since there was nothing more sacred. The Earth was invoked to seal transactions, especially political interactions. Parties to pacts and other acts sealed by swearing oaths to the Earth by kissing it, or even grabbing a fistful of dirt, when they were not face to face.[25]

35. In the Altiplano Sur, in the *pakajaqi*, Pacajes Province today, Mother Earth is *Llumpaqa Mama*. The word *llumpaqa* has become obsolete and has been retained only for ceremonial purposes. Bertonio assists us once again with seventeenth century references:

> *Llumpaka. Koma*: clean, smooth, polished;
>
> *Llumpacahatha, Komachatha*: to clean, to polish, to make shine;
>
> *Llumpacaqui Sarnacatha*: to live chastely, or without causing trouble as a righteous man.

36. *Llumpaqa* concerns the relationship that exists between the Earth and cleanliness, in other words, hygiene and well-being. Clearly the concept of *Llumpaqa* is what Mother Earth should be. What stands in contrast to this concept is that which breaches the norms, contravenes the law, and interferes with the journey of the individual, family and society as a whole.

[25] See *Causa hecha a los curacas camachicos y mandones del pueblo de San Francisco de Otuco en el siglo XVII*, in *Procesos y visitas de idolatrías. Cajatambo Siglo XVII*, Pierre Duviols, (Lima, PUCP, 2003).

37. The concept of Qamiri entails compliance with the law, and, for the benefit of the non-indigenous public, has been translated as *suma qamaña*, living well. The *Qamiri* is the world wise traveller who knows what it means to live life to the fullest. The opposite is:

> *Pacha ccuya haque*: wretched man with no sense of compass.

38. In contemporary Aymara language Ccuya is rendered as *q'uya*, meaning wretched individual. However, with the prefix *Pacha*, an individual is said to be wretched in terms of the Earth, the world and time. It is a philosophical concept of poverty, meaning, in other words, "he who is uneducated in the ways of life", according to Bertonio, who also informs us that: *Pachaccuya maynina ysuhuaaña sarnaqata*: means to live forsaken by all, humiliated.

39. That is how society views the one who has run afoul of society and as a result has been cast adrift. Bertonio further enlightens us in his dictionary on *qulla* thinking as follows:

> *Pacha*: everything or everyone;
>
> *Marcapacha*: the community as a whole;
>
> *Taqquepacha haq*: all men or persons.

40. All members of society (*markapacha*), all persons (*taqijaqipacha*), those who comply with the law. The one who has offended is a poor wretched soul who feels humiliated in the presence of *qamiri*, those who are educated in the ways of life. Transgression angers Mother Earth. Fernando de Santillán once again enlightens us:

> It was said that the Earth became angry where evil occurred, and chicha was spilled and clothes were burned to placate it.

41. *Pachamama*, Earth, fertile and productive Mother, has its laws, its rights. It is through compliance that one becomes a *qamiri*, one who is educated in the ways of life. *Qamiri* is derived from the verb *qama*, which also means "home". *Qamiri* as a quality may apply to both the individual and the collective, resulting from compliance, which accounts for a full life in harmony with nature, the various facets of Mother Earth.

42. The *Qamiri* possesses an adequacy of resources and spirituality. He is familiar with the "rotation of the sun and the stars";[26] he speaks with mountains. All of this is grounded in deep knowledge that he applies. Observation of the sun and the stars merges with study of nature and the behaviour of animals, permitting the forecast of phenomena such as drought, frosts and the rainy seasons. Ultimately, the *qamiri* is a person worthy of respect, *alli yachachic macho vava*, one who knows everything about life, who spends his last few days teaching young people. It was believed that the *vava* embodied the mountains. Fernando de Santillán tells us about that:

> It was commonly believed and assumed that when a good person died, he returned from whence he came, which was under the Earth, where men lived in full repose.

[26] See Felipe Guaman Poma de Ayala, *Nueva Coronica y Buen Gobierno* (1615); available from www.kb.dk/permalink/2006/poma/info/es/frontpage.htm.

43. The concept of Mother Earth was developed in the Andes as a framework for compiling and developing a universal vision shared by a diversity of cultures, particularly indigenous ones. The Mapuche people, whose original territory is in the southern areas of Argentina and Chile, consider themselves as "people of the Earth" (*mapu-che*); and their language, *Mapudungun*, means "language of the Earth". *Mapu* means Earth, while *che* means people.[27] In this context, Earth is *Nuke Mapu*, meaning Mother Earth, which in political thought becomes *Wall Mapu*, which means territory. The Mapuche people as a whole see themselves as sons and daughters of the Earth. Their efforts are aimed at recovering land confiscated by Chile. They believe that people, land and nature constitute a single entity, which is why they see themselves as buds of the Earth: "the Mapuche word has a much deeper meaning than that of people of the Earth: it means bud of the Earth, people who emerge from the Earth, live, travel on it, protect it and, when they die, return to the Earth".[28] In this regard, the concept of *Admapu* is important: it includes a set of rules, observed and taught by the members of the community (*lof*), that regulate all life cycles of the Mapuche people, which, when broken, create conflict. Responsibility for transgression is individual as well as communal.

44. In Guarani thinking, walking the Earth without evil (*Yaguata ivi maráevae koti*) is the mark of cultural existence and continuity, and compliance with the law is an important element. Failure to do so causes ecological, social and economic imbalance in the community. If the imbalance is significant, the community may disappear and need to be reconstituted. To walk the Earth one must not commit evil deeds (*ñomboete, yoparareko, mboyopoepi*), which has sustained the Guarani identity. The connection stems from the principle *Ñande Reko*, which may be translated as "our way of being, different from others, the Spaniards and their descendants". This Guarani way of being is called *tekoa*, which in ancient times was *teko katu*, "good, free life". *Teko* means "being, quality of life, custom, law, habit". In the concept of Earth without evil, *teko* also has to do with the character of the person walking.[29]

45. The path also has its spirit. Talking, making offerings of coca leaves or pouring libation are expressions of respect. Personal health, whether spiritual or physical, also depends on how healthy our relations are with Mother Earth, which provides us with all kinds of medicines. Doctors are duty bound to consult their patients in order to gather relevant information. All this is not religion but simply respect for nature, for nature's other beings. It is knowing how to share with them. Nature, of which mankind is a part, is *Pachamama*. The rights of *Pachamama* could be inherent in the rights of humankind, human rights.

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[27] See Juan Carlos Radovich et al. "La Etnicidad Mapuche en un contexto de relocalizacion: el caso de Pilquiniyeu del Limay", available from: http://siteresources.worldbank.org/intlacinspanish/Resources/5_2_conflictos_Radovich_ppt_es.pdf.

[28] See "Mediacion entre Machis: Experiencia para validar una propuesta de diseno en mediacion mapuche", p. 6, available from: http://www.cejamericas.org/doc/documentos/4_med_polsocial_4_pkrause_rparada.pdf; Centro de Mediacion, Temuco.

[29] See Bartomeu Melia, *Ñande reko, nuestro modo de ser y bibliografia general comentada* (La Paz, CIPCA 1988).

VI. The rights of Mother Earth in non-indigenous areas*

46. In recent years there has been a paradigm shift in rights. Numerous subjects who heretofore had no guaranteed rights now enjoy such rights. Similarly, inanimate beings have been endowed with rights because it was felt that they needed to be protected to the extent that they were of concern to human beings. There appears to be a conceptual change in the history of human rights.[30] Some outlooks are undergoing change in the face of evidence, including scientific evidence, with the idea that human beings have a symbiotic relationship with nature, gaining currency.

47. This is not something that has only just been realized. In 1949, with the advent of international human rights law, Aldo Leopold proposed a *Land Ethic*, arguing that the individual is part of a community and that this community is a *Whole*. His proposal sought to change human behaviour from that of conqueror of the land to a citizen of it, implying respect for the other beings that are part of that natural community.[31] In 1969, James Lovelock proposed the Gaia Hypothesis, which considered the Earth as a single organism in which all parts, including human beings, are almost as closely interrelated and as interdependent as the cells of the human body.[32] Similarly, the deep ecology movement, which has been promoted by Arne Naess since 1973, states that all human beings are constituent parts of one single natural system and are therefore interdependent with the other components. Thus, all natural things have the right to exist, regardless of their capacity for self-determination.[33] Deep ecology promotes a new integrating vision of the universe as a network of relations.[34] What is called spiritual ecology also proposes a closer relationship between nature and mankind.[35]

48. On the other hand, the idea that humans own nature might be considered a serious failure of non-indigenous thought and rights. There was a time when men thought that they could own women, an owner and chattel relationship that is obviously no longer the case. The same thing happened with the enslavement of human beings, on the basis of race with no distinction as to gender or age. The same idea of domination remains alive between men and natural beings. This position can be countered in cultures such as Hinduism.[36] We are undergoing an evolution in all human cultures, including non-indigenous ones, in light of evidence that we need a new relationship with nature.

49. The current system of environmental management has failed to prevent the deterioration or destruction of natural communities and ecosystems. Protection and

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* The authors of the present report are grateful to Gabriela Reyes for her assistance in preparing this section.

[30] Christopher D. Stone, *Should Trees Have Standing? Law, Morality and the Environment* (New York, Oxford University Press, 2010).

[31] http://132.248.62.51/sv/sv/2007/agosto/aldoleopold.pdf; Victor Manuel Casas Perez, *Aldo Leopold: La Etica de la Tierra*; Aldo Leopold Nature Center; http://www.naturenet.com/alnc/aldo.html.

[32] James Lovelock, *The Revenge of Gaia: Earth's Climate Crisis and the Fate of Humanity* (New York, Basic Books, 2006).

[33] *The Selected Works of Arne Naess* (New York, Springer, 2005).

[34] Fritjof Capra, *La trama de la vida: Una nueva perspectiva de los sistemas vivos* (Barcelona, Anagrama, 1998).

[35] Thomas Berry, *The Sacred Universe: Earth, Spirituality and Religion in the Twenty-First Century* (New York, Columbia University Press, 2009).

[36] Satish Kumar, *Spiritual Compass: The Three Qualities of Life* (Totnes, Green Books, 2007).

conservation efforts are failing because they focus on the adverse impact on the environment without addressing their causes. Natural communities and ecosystems are treated as private or public property. Mankind does not see itself as their guardian or beneficiary. Practically all non-human elements on Earth are legally considered as "natural resources" to be exploited by humankind or, more precisely, by corporations that emphasize maximizing profits for their shareholders and only engage in responsible social behaviour as regards nature and humankind as an afterthought.

50. Thus, such obvious effects of the deterioration of nature as climate change are considered and addressed not as evidence of a failed system but as phenomena that must be identified and dealt with separately. Environmental and natural degradation are symptoms of systemic problems that cannot be addressed successfully without fundamental institutional changes — and changes in the cultures which undergird such institutions. One has to lay blame at the feet of the cultures of States bent on unbridled development through the exploitation of nature, conceived as a mere repository of resources. Thus, this amply justifies recognizing or restituting rights to nature, through legislation arising not only from the State but also from popular culture.

51. A change of approach appears to be emerging in the field of law. For example, United States law has come to reflect a disposition to entertain administrative or judicial claims brought on behalf of natural beings or even access by them to justice through parent institutions,[37] which serves to counter the usual argument that entities with no inherent capacity for self-identification have no rights. Even the defence of the rights of inanimate things and animal species could be entrusted to institutions.[38]

52. A paradigm shift has been possible in the United Nations since the World Charter for Nature, in 1982. This is yet to be brought about. Since then, the United Nations has acknowledged that humankind is but one of the constituent species of nature and that its own existence is dependent on its symbiosis with nature, and that all life forms have intrinsic value and therefore deserve, "regardless of their worth to man", due respect from the human species. The recent resolution on harmony with nature rightly places the World Charter for Nature first among its preambular paragraphs. However, the utilitarian approach is still reflected in the resolution because of the "lasting benefits from nature", in the sole interest of mankind, no longer in symbiosis with nature. Thus, the aim in 1982 was to avoid excesses "through excessive exploitation ... by man" and not when consequently his behaviour is not in harmony with nature and the intrinsic value of its components and species.

53. A declaration on the rights of Mother Earth would highlight the consequences that were left unaddressed in 1982. The proposal has been made from an indigenous perspective, specifically the Andean one, but it has also been shown that the vision is not alien to the most sensitive non-indigenous sectors and that it is in tune with recent developments in both the international and national spheres.

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[37] http://supreme.justia.com/us/405/727/case.html, *Sierra Club v. Morton*, 1972, opinion of William O. Douglas; http://www.supremecourtus.gov/opinions/06pdf/05-1120.pdf: Massachusetts et al. v. Environmental Protection Agency et al.

[38] http://www.animallaw.info/cases/topiccases/catoesa.htm, site of the *Animal Legal and Historical Center* of the College of Law of Michigan State University, where other highly eloquent cases may be found.

Annex

Summary of a declaration on the rights of Mother Earth

Proposal by President Evo Morales Ayma of the Plurinational State of Bolivia, made to the General Assembly of the United Nations on 22 April 2009, the first International Mother Earth Day.

1. The right to life

This means the right to exist, the right of every ecosystem, animal or vegetable species, snow-capped mountain, river or lake not to be eliminated or exterminated by irresponsible behaviour on the part of human beings. We humans must acknowledge that Mother Earth and other living beings also have the right to exist and that our rights end where we begin to cause the extinction or destruction of nature.

2. The right to the regeneration of biocapacity

Mother Earth must be able to regenerate her biodiversity; neither human activity on planet Earth nor Earth's resources are infinite. Development cannot be open-ended, there is a limit and that limit is the ability of the animal, vegetable and forest species, of water sources, of the very atmosphere to regenerate. If we human beings consume and, even worse, waste more than Mother Earth is capable of replacing or recreating then we are slowly killing our home, little by little we are choking our planet, all living beings and ourselves.

3. The right to a clean life

Means the right of Mother Earth to a life free from pollution, because not only we humans have the right to live well, but also rivers, fish, animals, trees and the Earth itself have the right to live in a healthy environment, free from poison and pollution.

4. The right to harmony and balance with everyone and among everyone

Mother Earth has a right to be recognized as a part of a system in which all living creatures are interdependent. This implies the right to live in harmony with human beings. There are millions of living species on the planet, but only we human beings have the awareness and ability to take command of our own destiny in order to promote harmony with nature.